CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA

AT

SHREVEPORT,

IN

OCTOBER, 1883.

JUDGES OF THE COURT:

Hon. EDWARD BERMUDEZ, *Chief Justice.*

Hon. FÉLIX P. POCHÉ,
Hon. ROBERT B. TODD,
Hon. CHARLES E. FENNER,*
Hon. THOMAS C. MANNING,
} *Associate Justices.*

No. 102.

SUCCESSION OF JAMES MARKS, JR.

REBECCA L. MARKS VS. MATHILDA R. MARKS, EXECUTRIX.

The *légitime* of a father or mother, or both, in the testamentary succession of a child deceased without posterity, is *one-third* and not *one-fourth*, and this to the exclusion of brothers and sisters. The disposable portion in such a case being two-thirds only. Cole vs. Cole, 7 N. S. 414, overruled.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

R. J. Looney for Plaintiff and Appellant.

Land & Land for Defendant and Appellee:

When the deceased leaves a father or mother, he or she is forced heir for the one-fourth of the estate. And the child may dispose of three-fourths by last will and testament. Cole vs. Cole, 7 N. S. 414; Theall vs. Theall, 11 La. 429; Barbet vs. Roth, 14 An. 381.

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* Absent during the whole of this term.

This has been a rule of inheritance in Louisiana since 1829, and the doctrine of *stare decisis* applies.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action by a legitimate mother for her *légitime* from the testamentary succession of her son, who has died leaving brothers and sisters and a wife, instituting the latter his universal legatee. The mother claims that *légitime* to be *one-third* of the estate. The defense is, that it is *one-fourth* and no more.

The District Judge, dealing with the question as *res nova*, thought that the *légitime* should be *one-third*, but reluctantly yielding to the doubtful authority of a ruling made more than half a century ago, rendered judgment for *one-fourth* only.

It is not correct to say that it is established by the jurisprudence of this State that the *légitime* in such a case is *one-fourth*.

The only case in which the question was really presented, is that of Cole vs. Cole, 7 N. S. 414. It is true that the Court there decided that the *légitime* of the only immediate ascendant, *the mother*, was one-fourth; but the mere reading of the opinion shows that the Court, composed of three Judges, two only of whom participated in the decision of the cause, did not grasp and solve the difficulty as might have been done. Far from reconciling three Articles of the Code, the Court assumes to eliminate from it the last of them, because it was thought incompatible with the previous ones, although it was couched in negative terms and was one of public order and good morals. In its inability to cause the two Articles to operate harmoniously, the Court declares: "we cannot untie the knot: we must cut it." The cutting resulted in the excision from the Code of the provisions of the last enacted or adopted Article on the subject of the *légitime* of father or mother, or both. The reason is unsatisfactory and not binding.

It cannot be pretended that the ruling then made was ever subsequently followed.

In the Theall case, 11 L. 431, decided eight years later, it is not mentioned or even alluded to. There was no occasion for it. The Court allowed *one-fourth* to the mother, not because she was not entitled to *one-third*, but because she had claimed *one-fourth* only. The contention was as to the obligation of the mother of opting between a legacy and the *légitime*, which she herself had represented as being *one-fourth*.

In the Grover case, 7 An. 173, the *third* could not have been allowed, for the obvious reason that the child having died intestate, her succession was a legal one.

In the Barbet case, 14 An. 381, the mother sued to reduce the universal legacy of her daughter to the latter's husband, to the disposable portion, which the Court declared to be *two-thirds*, allowing the mother *one-third* as her *légitime*.

For declining to apply the ruling in the Cole case, the Court, through its organ, declared that "the case must be examined in reference to the facts on which it was decided."

Mr. Justice Buchanan, in his lucid, considerate, and well reasoned concurring opinion takes the proper view of the law governing in such cases. He regards "the doctrine enunciated in the Cole case as contrary to Article 1481 of the Code" of 1825, and unequivocally declares:

"There is a very simple and obvious way of reconciling Articles 899 and 900 with Article 1481 of the Code, which is to consider the first as a statute of distribution of intestate successions, the second, a statute of distributions in successions testamentary. One is an allotment made of a man's estate, when he has not chosen to make any allotment himself. The other, a restriction upon the disposing power of a man over his own property by testament. The doctrine of Cole, if adhered to, would expunge Article 1481 from the Code. The doctrine is substantially as follows: Article 1481 is irreconcilable with Articles 899 and 900; therefore, it must yield to those Articles, and consequently the *légitime* of a father or mother of a decedent, who leaves a brother or brothers is, in no case, more than *one-fourth* of the succession.

"Now, besides the fundamental error in the premises, the want of incompatibility of the Articles, the conclusion is erroneous, even if the premises were correct; for it is a rule of interpretation, that, when two Articles of the Code cannot be reconciled, the last in order and highest in number, prevails over the other."

That reasoning of the learned Justice is unanswerable.

But, besides, it can very plausibly be said, that the philosophy, the policy of the law, is adverse to the announcement in the Cole case. The reason for which the law allows *one-fourth* only to the father or mother, in an intestate succession, is that, what remains thereafter accrues to the collateral heirs of deceased, who the law presumes will provide more amply for the father or mother, should the fourth prove insufficient.

Such is not the case however in testamentary successions, in which the testator undertakes to derogate from the disposition which the law would have made of his estate at his death, in the absence of a will and substitute his will thereto. In the apprehension that the testator might dispose of his property in favor of a stranger, who would not have for the mother or father the same kindly feeling which other children,

by nature, would have, the law fixes that position at *one-third* instead of *one-fourth.*

There can be no possible escape from the operation of Article 1481, now Article 1494, which unequivocally reads in *negative* terms:

"Donations *inter vivos,* or *mortis causa,* cannot exceed *two-thirds* of the property, if the disposer, having no children, leave a father, mother or both."

It may be that the law giver might have provided more amply in favor of *both,* and that the omission is to be deplored; but with that we have nothing to do. We can only say that he has well done by increasing the share of father or mother to *one-third* in testamentary, from *one-fourth* in intestate successions.

This construction results in the occision of a lurking *lusus curiæ,* in the undoing of the knot, the reconciliation of important Articles of the Code to which violence had unnecessarily been done, the termination of an abnormal condition of things, and the formal retention in that main body of our laws of a wise and salutary provision which the decision in the Cole case had without warrant unmercifully expunged from it.

The judgment of the District Court recognized plaintiff as a forced heir, but did not allow her the full *quantum* to which she is entitled. It must be amended.

It is, therefore, ordered and decreed that the judgment appealed from be amended by striking therefrom the word "*fourth*" and substituting thereto the word "*third,*" and that thus amended, it be affirmed with costs in both Courts.

No. 101.

JOHN R. JONES ET AL. VS. SAMUEL P. RAINES, SHERIFF AND TAX COLLECTOR.

Sawmills are not manufactures within the meaning of the provisions of Article 207 of the Constitution, and are therefore not exempt from taxation.

APPEAL from the Eleventh District Court, Parish of Natchitoches. *Pierson,* J.

Jack & Dismukes and *Alexander & Blanchard* for Plaintiffs and Appellants:

1. Article 207 of the Constitution of 1879, exempts from taxation and license, for a period of ten years, "the capital, machinery and other property employed in the manufacture of * * * * * agricultural implements, furniture, and other articles of wood."

Webster defines the word manufacture, as "the operation of reducing raw materials of any

kind into a form suitable for use." It is defined by Worcester, as "the process of making anything by art, or of reducing material into a form fit for use."

To convert trees and logs into marketable lumber is to manufacture it, hence a sawmill and its appurtenances, where more than five hands are employed, is exempt from taxation.

2. This Court, in City of New Orleans vs. Ernst & Co, 35 An., recently held a rice mill to be a manufactory. Every reason given in that case, applies as forcibly to a sawmill.

3. The last U. S. Bankrupt Act provided for the involuntary bankruptcy of "bankers, brokers, merchants, traders, and manufacturers." Under this clause of that Act, proprietors of sawmills were held to be manufacturers. Bump's Bankruptcy, p. 411, cases cited.

4 If there were any doubts on the point, the official Journal of the Convention shows, that it was the clearly expressed intention of the framers of the Constitution that sawmills should be included in the list of exempt manufacturers. See official Journal of Constitutional Convention of 1879, pp. 211, 212, 323, 324.

D. C. Scarborough, District Attorney, for Defendant and Appellee:

All property is primarily liable to taxation, and the power to tax is never presumed to have been withheld except by the clear letter of the law, and all reasonable construction will be used against rather than in favor of exemption. 34 An. 596; 34 An. 574, 954; 33 An. 622; Cooley on Taxation, pp. 146, 55, 198.

Only such manufactories were exempted from taxation, under Article 207 of the Constitution, as were engaged in the manufacture of finished articles, such as agricultural implements and furniture, as these are the examples given by which we are to interpret their meaning. See Art. 207 of Constitution of 1879.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs prosecute this appeal from a judgment denying the exemption from taxation of their sawmill, in which more than five hands are employed. The exemption is claimed under that provision of Article 207 of the Constitution, which reads as follows:

"There shall also be exempt from taxation and license for a period of ten years from the adoption of this Constitution, the capital, machinery and other property employed in the manufacture of textile fabrics, leather, shoes, harness, saddlery, hats, flour, machinery, agricultural implements, and furniture and other articles of wood, marble or stone, soap, stationery, ink and paper, boatbuilding and chocolate; provided that no less than five hands are employed in any one factory."

The question is, therefore, whether a sawmill is a manufacture within the meaning of that constitutional provision, which treats of the exceptions from the general rule under which all property is liable to taxation. It is now an elementary rule of construction in our jurisprudence, as well as in that of our sister States, that all exemptions must be strictly construed, and that every presumption will be made against an exemption from taxation. State ex rel. Bertel vs. Assessors, 34 An. 574; Cooley on Taxation, 146; 18 Wall. 206; 97 U. S. R. 666; Grosse Tête R. R. vs. Kirkland, 33 An. 622; Danner vs. V. S. & P. Railway, 34 An. 954.

Hence, it is incumbent on plaintiffs to show that their property, herein sought to be exempted, comes clearly within the exceptions under which they invoke immunity from taxation.

In order to do this, they construed the constitutional exemption as intended to exempt all manufacturers of "articles of wood."

They are so deeply impressed with the correctness of that construction, that in their brief they quote the provision as reading on this point substantially as follows:

"There shall also be exempt from taxation and license for a period of ten years from the adoption of this Constitution, the capital, machinery and other property employed in the manufacture of * * * *and other articles of wood.*"

But to our minds the Article does not bear such a construction.

It proposes to exempt *some* manufactures, but not *all* manufactures, and it specifically enumerates the kinds of manufactures which were contemplated by the convention.

It is worthy of note that in the enumeration, each kind of manufacture is treated as a distinct and separate subject, and all are separated from each other by a *comma*, except the manufacture of "furniture" and "other articles of wood," which are not thus separated, and thus convey an idea of similarity in the subjects contemplated or provided for.

Had it been the intention of the framers of the Constitution to have included among the exemptions, all manufactures of "articles of wood, marble or stone," the sentence would have been constructed thus: *furniture* and *articles of wood, marble or stone.* But the enumeration, following the copulative conjunction "*and*," indicating the conclusion of an enumeration of distinct subjects, and the use of the word "*other*," as qualifying the articles of wood contemplated, both contribute to give a restrictive sense to the words "articles of wood," etc., and satisfy our minds that the articles of wood, marble or stone contemplated, were such as *furniture* or other like articles. Or, in other words, that the articles of wood contemplated by the convention were articles which, like furniture, were made from lumber, either sawed or split.

The object of the exemptions created by this provision of the Constitution was to encourage and foster the establishment of manufactures of the various articles daily needed by a people engaged mainly in agricultural pursuits; such as leather, harness, saddlery, machinery, agricultural implements, etc., the products of manufactures then very little known within the borders of the State.

This intention, and the idea that but a limited number of manufactures was contemplated in such an exemption, appear clearly to our minds by the refusal of the convention to adopt an amendment which proposed to include among the exemptions to manufactures of "skins, hides or hair, glass, crockery, china, porcelain, pottery, ivory or composition, canned goods, paints, varnishes." Journal of the Convention, page 211.

We note also on the same page of the journal, that the convention refused by a *viva voce* vote to include among the exemptions, "capital invested in sugarhouses and cotton gins," which is capital used in preparing for market the two staple products of the State.

It will not be denied that a sugarhouse comes more clearly within the definition of a manufacture than a sawmill.

It takes the stalk of the sugar cane, from which it extracts the raw juice, which it then boils down into sugar and molasses, both of which are fit for the table without further manipulation, and both of which are recognized to be among the most useful commodities in commerce. It is also a well known fact that sugarhouses contain a greater variety of and more costly machinery than sawmills. And yet, the convention unhesitatingly refused to extend its exemptions to that kind of property or manufacture.

This circumstance explains to our satisfaction the meaning and the effect of the refusal of the convention to include a special *proviso* to the effect, that sawmills should not be included in the exemptions provided for.

The understanding of the delegates was, that the absence of such property from the enumeration of exempted property, was a sufficient indication of its exclusion, without a special negation of the same.

The argument of counsel for plaintiffs on this point, although very ingenious, falls short of the intended effect.

Our conclusion is, therefore, that capital, machinery and other property employed in the construction and in the operation of sawmills, is not exempt from taxation under the provisions of Article 207 of the Constitution.

Hence, we must affirm the judgment appealed from.

No. 104.

WILLIAM ENDERS VS. JOHN A. SKANNAL.

Where, under a written contract, and for a valuable consideration, plaintiff acquired the privilege of erecting a sawmill on defendant's land and cutting and sawing timber therefrom, and before the expiration of the time allowed by the contract, his son in charge and his employees are driven from the place by violence, and plaintiff compelled to remove the mill, the jury, in estimating the damages, are not limited to the actual pecuniary loss resulting from a breach of the contract, but may treat the mode of its violation as an offense, and award damages therefor.

The wrong to the plaintiff was not less personal because the violence was used upon his employees, than if directed against himself. In such cases much discretion is left to the jury in assessing the damages.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

Wise & Herndon and *Land & Land* for Plaintiff and Appellee:

1. In a doubtful case the agreement is interpreted against him who has contracted the obligation, and also against him, whether obligor or obligee, when the doubt or obscurity arises from a want of necessary explanation which he should have given. C. C. 1957-8.
2. Damages due to the creditor are the amount of loss he has sustained, and the profit of which he has been deprived; when debtor is in bad faith he is responsible for such damages as are the immediate and direct consequence of the breach of the contract, whether they could have been foreseen or not; the jury is bound to give such damages as will fully indemnify the creditor; and in cases of offenses and quasi offenses, much discretion must be left to the jury. C. C. 1934.
3. On the mere quantum of damages, the Court will not disturb the judgment of the court below, or the verdict of the jury, unless the amount is manifestly excessive, or clearly unsupported by the evidence. 33 An. 26, 1053.
4. The law abhors all attempts to seek redress through violence and force, by persons who fancy themselves injured or are really so. Such transgressors will be mulcted in punitive damages—proportionate to the offense and the standing of the parties. 1 R. 141; 5 An. 337; 29 An. 223; 34 An. 1158.

Alexander & Blanchard for Defendant and Appellant:

1. The plaintiff himself first violated the contract, and the injuries of which he complains were superinduced by his own wrongful acts.

"A party can recover no damages for an injury to which he has himself contributed." *Volenti non fit injuria.* 17 L. 361; 18 L. 339; 7 An. 321; 8 An. 71; 28 An. 710.

2. "Plaintiff cannot take advantage of a sudden ebullition of passion, when no great injury is inflicted, to enrich himself at the offender's expense." 13 An. 116.

"Where both parties have reciprocally violated the law, no damages will be awarded to either." 15 An. 681; 34 An. 935.

3. Our law nowhere authorizes exemplary or punitory damages for a breach of contract. Such damages are only allowed in cases of offenses, quasi offenses, and quasi contracts. In all others, the law expressly forbids them.

Our Code provides two modes, and only two, for measuring damages for a violation or breach of contract:

One, where the debtor has been guilty of no fraud or bad faith, when he is liable for the actual damages suffered by the other party. The other, where the debtor has been guilty of bad faith—that is to say, has violated the contract through "motives of interest or ill-will,"

when consequential damages, or rather, such as are the immediate and direct consequence of the breach of contract, are allowed.

The compilers of the Code, to further emphasize these rules, added the words that, "even where there is fraud, the damages cannot exceed this;" and again, in giving to the Judge or jury much discretion in the assessment of damages for offenses and quasi offenses, are careful to add that, "in other cases they have none." C. C. 1934.

In requiring a strict adherence to these rules, for the measurement of damages for a breach of contract, our Court has gone so far as to declare that, "Beyond this, juries have no more right to exact a larger sum from a debtor than they have to increase the amount due by a promissory note." 3 An. 149, also same volume, pp. 110, 140.

4. "Damages for breach of contract are those which, incidental to and caused by it, may reasonably be supposed to have been contemplated by the parties at the time of the contract. Damages for supposed profits, based on the speculative opinions of witnesses, cannot be given." 11 An. 300; 3 An. 105, 140, 149; 6 An. 365, 491; 17 An. 239; 18 An. 646 25 An. 419; 28 An. 777; 29 An. 286; 30 An. 264.

5. An employer is not entitled to recover any damages for personal violence to his employees. The right to claim damages for such violence is a personal one, which belongs to the employees alone, and cannot be exercised by their employer.

All "illegal acts, done wickedly, and with intent to injure," are classed as "offenses" under our law. They constitute one of the sources of obligations, for out of them arises an obligation in favor of the person injured, against the person who commits the act of violence, for the damages suffered by him. This right of action is a strictly personal one to the injured person, and can be exercised by no one else, save in the one exceptional case provided by the Code, viz: If death ensues, the right of action survives in favor of the minor children and widow of deceased. C. C. 2315; 10 An. 33; Sedgwick on Damages, p. 549.

The opinion of the Court was delivered by

TODD, J. This is an action to recover damages for an alleged violation of a contract and eviction from certain lands by means of violence and threats.

The defense is substantially the general issue and the contention that it was the plaintiff who had first violated the contract and had misconstrued it throughout.

The case was tried by a jury, which gave a verdict against the defendant for four thousand dollars, and he has appealed.

The plaintiff is engaged in the manufacture of furniture, sash, doors, blinds, etc., in the City of Shreveport; he had gone to considerable expense in establishing the factory and had quite a number of operatives employed, some of them, as the evidence shows, brought from distant States.

Finding it difficult, if not impossible, to procure lumber from the sawmills in the vicinity of the kind needed in his business, which was principally cotton-wood, gum, ash, etc., it became necessary to establish a mill of his own, in order to have a constant supply of the lumber required.

The defendant was the owner of a plantation on Red River, consist-

ing of about 1,000 acres, 250 in cultivation and the balance heavily timbered. He wanted more of his land cleared and needed lumber to improve his plantation. Plaintiff required timber for his mill of the kinds designated, with which the land abounded, and moved by these considerations, the defendant drew up and plaintiff signed the following writing:

"I obligate myself, for the privilege of cutting timber off that portion of J. A. Skannal's Chalk Level place which he intends clearing, and for putting a sawmill on the place, to furnish him, free of cost, twenty-five hundred feet of lumber during the month of August, and seventy-five thousand feet additional as he may order during the remaining twelve months.

"I further obligate myself to burn and move off the ground, all logs and brush left from timber cut in a reasonable length of time, and to burn all sawdust made by the mill, and to interfere with no hands on the place, by hiring or other means, without consent of J. A. Skannal. The lumber I furnish him is to be good cotton-wood lumber.

WM. ENDERS."

"The twenty-five hundred feet in first part of this contract should be twenty-five thousand.

WM. ENDERS."

The defendant did not sign, but when this was suggested to him by plaintiff, he replied, "that he was a gentleman and was good for what he said." It is not questioned that, though the contract was in this form, it was essentially commutative in its character.

The subsequent difficulties of the parties grew out of the constructions placed by them respectively on this agreement.

The evidence shows that, shortly after its execution, the plaintiff erected the sawmill on the land in a locality which he deemed most convenient to the timber, with the approval, as to the choice of location, of the defendant—the original cost of the mill and of its transportation and construction entailing an expense of several thousand dollars. He employed a considerable number of hands in felling and cutting the timber, and commenced sawing large quantities of lumber. He supplied the defendant with lumber from time to time in such quantities as he needed or called for, in compliance with the stipulations of the contract. There is, at least, no complaint that he failed in this respect. He did not deliver the entire quantity mentioned in the contract, being prevented from doing so by events which we will proceed to relate.

The undertaking of the plaintiff had proceeded apparently to the satisfaction of both parties until January, 1882.

In that month, the overseer of the defendant ordered the laborers, who were colored, and then under the charge of the plaintiff's son, to leave the premises, and threatened to have them arrested for trespass if they did not. When this was reported to the plaintiff, he dispatched to the place a number of white laborers, who were put to work felling the trees. What then occurred is best told by one of the witnesses. Young Enders, son of the plaintiff, states:

"Mr. Skannal rode up and told them that the next man that put an axe in a tree he would kill him on the spot; and he then came to the mill and told me that if I allowed any more trees to be cut, he would kill me; he was not armed, but said he would go up and get his gun."

At this the laborers ceased work and returned to Shreveport.

The plaintiff thereupon sent down another set of hands in charge of a Mr. Chaffin. We leave the same witness again to say what followed. He states:

"The men had not made more than four or five strikes with their axes, before Mr. Skannal rode up with his gun. He rode to the hands and told them, that the first man who struck another axe in a tree, he would kill him on the spot. He had a Winchester rifle. He met Chaffin and me in the road, when he was coming toward the house, and he said: 'Chaffin! by God! are you at the head of this business?' Chaffin replied that he had come down there for Mr. Enders to cut timber. Skannal then said: 'Chaffin, I will give you fifteen minutes to leave my place; if you don't, I will kill you on the spot.'

"Chaffin then said: 'Skannal, that is no way to do business; there is law in this country, and there are other ways for you to stop us from cutting without bringing your gun down on us.' Skannal then said: 'Damn the law! I own this land and I am going to have things here my way, and if I can't do it any other way, I will do it with my gun.'

"In the meantime the hands returned to the house, when Skannal rode up and said: 'Gentlemen, I will give you five minutes to leave my place, and if you don't, I will be forced to use my gun on you.'

"All of the hands left but two. One of these asked for a little more time to get ready. Skannal then got down from his horse and said: 'I'll be God damned if you don't leave now.'

"Skannal then commenced abusing plaintiff, saying that if the old man had come there himself, things would have been settled long ago.

"Skannal then told us that he did not propose to have any one cut on his land, that he *intended to clear* every damn foot that was under fence and he did not propose to have another tree cut there."

The statement of this witness is fully corroborated and, in fact, its correctness on this point is not questioned.

In consequence of this violence the engagement between the parties was abruptly terminated, and the plaintiff left the premises and removed his mill therefrom.

The defendant's counsel, while they do not approve of his conduct, undertake to justify the defendant's asserted construction of the contract which led to his violent proceedings.

According to defendant's construction and that of his counsel, the main, if not the sole object of the contract was to procure the clearing of the defendant's land, and that all the operations and movements of the plaintiff should be conducted mainly to that end. The plaintiff, his laborers and his mill were not to be in the defendant's way; they must get out of his way when his (defendant's) part of the work of clearing was going on. Everything must subserve this purpose. We do not so read the contract, and do not so construe it intrinsically, or when viewed in the light of the attending circumstances. The very letter of the writing shows that the business of the mill was to continue at least one year. And when we consider the object plaintiff had in view, and what preceded the execution of the writing, in both parties going over the entire tract and examining the timber, and also the character and dimensions of plaintiff's business at that time and prospectively, and moreover consider the very liberal price he paid for the privilege of disincumbering the land of worthless timber—at least, comparatively worthless to the defendant—and other circumstances we need not detail, we are satified that it could hardly have entered into the contemplation of either party that plaintiff was not to have ample time to accomplish the purposes and ends he had in view, prompted and to be measured by the requirements of his business, the character of which must have been known to the defendant—that is, time enough to cut down and saw up all the timber he wanted, if it took years to do it. He made no objection to the size or capacity of the mill; he consented to its being placed where it was; he could have formed some idea of the time it would probably take to saw up all the timber on the land; and if this arrangement did not suit him, he should have so informed the plaintiff.

We have attentively read the evidence, and we think it but the shallowest pretense, that plaintiff was the first violator of the agreement, and justified the conduct of the defendant. It can hardly be seriously urged.

In regard to the damages allowed, we are not satisfied that they are excessive. The defendant's counsel earnestly contend, that the damages should be confined to the actual pecuniary loss resulting from the breach of the contract, which they proceed to estimate at a very low

figure. Even if that were the limit in this case, it would sum up to no insignificant amount. The expenses incurred in transporting the machinery and constructing the mill, and then taking it down and removing it; the loss to plaintiff's business in being deprived of the means of supplying himself with the kind of lumber needed for his factory, made at his own mill at an expense, as proved, of $4 less per thousand than if he bought it at other mills, even if it could be procured at all, all these and more were legitimate matters for the computation of the actual pecuniary loss.

They were not mere speculative opinions of future profits. But we do not agree with the counsel that it was to be thus limited. There was not only a breach of the contract, but it was a breach made in such a way and accompanied by such acts as to constitute an offense under the laws.

We have held, that the plaintiff had a legal right to stay on defendant's land; he was driven therefrom by threats and violence. The outrage to his feelings for such wanton and unjustifiable conduct should rightfully be weighed and considered. Nor was it any less a personal wrong to the plaintiff because the violence and threats which evicted him from the land, were made against his son and employees than if directed against him in person. There exists no such legal distinction as the counsel announce. This feature of the case is one, in the determination of which, much discretion is allowed the jury. C. C. 1934; 29 An. 223; 34 An. 1158. We cannot say that it has been abused in this instance. If the verdict but serves to teach the defendant that there is still some potency in the law he so much despises, and that its ways and methods, if somewhat slower, are surer, and even less expensive than those he so much affects, it may prove that in this instance the jury exercised a wise discretion and conveyed a wholesome lesson.

Judgment affirmed.

No. 105.

Henry Bodenheimer et al. vs. Executors of Lazarus Bodenheimer.

Stale claims, long withheld from prosecution or presentation, are regarded with disfavor.

Extra-judicial admissions of a dead man are the weakest of all evidence, since they cannot be contradicted, and no fear of detection in false swearing impends over the witness.

The evidence of a claim that has long been delayed in its prosecution, when no hindrance was in the way, must be more conclusive than in ordinary circumstances. It must be established with more than reasonable certainty.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

T. F. Bell and *J. S. Young* for Plaintiffs and Appellants.

Alexander & Blanchard and *Land & Land* for Defendants and Appellees.

The opinion of the Court was delivered by

MANNING, J. The plaintiffs, children of Jacob Bodenheimer, who died in 1864, sue for the value of one hundred and two bales of cotton, alleged to be $13,770, which their mother and tutrix "delivered to Lazarus Bodenheimer in the summer of 1865 with the agreement and promise on his part that he would take it and pay the value of it." Prescription is pleaded, and the general issue.

The suit was filed in September, 1882. The inventory of Jacob Bodenheimer's estate taken July 15, 1864, has no mention of cotton, but the omission of that article of property at that particular juncture from the inventory is not prejudicial to the claim. It was a time when eager eyes were searching for it, and wary owners cautiously concealed the places of its concealment. The sum total of the inventory was $765.76 in Confederate currency.

Lazarus Bodenheimer was a nephew of Jacob, and was in the quartermaster or commissary departments of the Confederate Army, and was stationed at Shreveport during the last two years of the war. The house in which Jacob and his family lived at Bellevue belonged to Lazarus. The theory of the defendants is that Lazarus availed himself of his opportunities to buy cotton, stored it at Bellevue or his premises under the eye of his uncle, where it was preserved, and at the close of the war had it hauled to Shreveport where he sold it. The facts proved are that it was thus stored, and was hauled to Shreveport by the direction of Lazarus in July, 1865, and that he sold it as his own, and no one gainsayed his exclusive ownership of it.

About that time the widow and her children came also to Shreveport, and lived there where Lazarus likewise lived, in active prosperous business until his death in December, 1881. During these sixteen and a half years no claim was preferred against Lazarus by the widow, or any child when it attained majority, or anyone for them, on account of this cotton. Apparently they had nothing. Lazarus died with a fortune of one hundred and sixty thousand dollars. The oldest child married, lived fourteen years thereafter, died, and made no sign of reclamation against her kinsman. Nor is she represented in this suit. The oldest of three plaintiffs is a man of thirty years, the youngest has attained majority. Seventeen years elapsed between the close of the war and the sale of the cotton, and the filing of this suit.

All these circumstances are suspicious. The claim has the appear-

ance of being vamped for the occasion. It has been withheld from the light until he, who alone could have told the true story of it, has gone down into the dark valley, from whose shadow no voice can come in contradiction. Stale claims are regarded with disfavor. Davenport vs. Labauve, 5 Ann. 141; Simpson vs. Powell, 7 Ann. 555; Suc. Rice, 14 Ann. 317, not in syllabus; 2 Story's Equity, § 1520.

Besides the unexplained delay of the widow, who must have needed money, and of the children who became majors before Lazarus died, the testimony of the widow is unsatisfactory in the last degree, and often self-contradictory. The other witness is the man whom Lazarus hired to haul the cotton to Shreveport in 1865, and who affects to remember his conversations at that time. He details the pretended statements and admissions of Lazarus of the ownership of the cotton by Jacob's family.

Extra-judicial admissions of a dead man are the weakest of all evidence. They cannot be contradicted. No fear of detection in false swearing impends over the witness. In most instances such testimony is scarcely worthy of consideration. Suc. Fox, 2 Rob. 299: Wilder vs. Franklin, 10 Ann. 279; Bringier vs. Gordon, 14 Ann. 274. In the present case it does not command our confidence in its truth. The lower Judge disregarded it, and so shall we.

Plaintiffs must establish their claims with reasonable certainty under any circumstances. A stale claim, pertinaciously and long withheld from presentation or prosecution until he, against whom it is to be preferred, has died must be established with more than reasonable certainty. An unfavorable presumption is created by the delay. It can be removed only by peculiarly strong and exceptionally conclusive testimony. The testimony here is of the weakest and most inconclusive kind.

Judgment affirmed.

No. 130.

THE STATE OF LOUISIANA EX REL. HARDENBURGH VS. THE JUDGES OF THE FIRST DISTRICT COURT, PARISH OF CADDO.

A mandamus does not lie to compel a District Judge to appoint an attorney-at-law to try a case in which he has recused himself as having been of counsel, when the Court, of which he is an officer, is represented by another Judge clothed with concurrent powers, and who is not himself recused.

The Act of 1880, No. 40, is inoperative in such a case.

Under Act of 1882, No. 71, the Judges of the District Court for the First Judicial District are authorized to adopt rules for the classification and distribution of causes before that Court, and to provide for the trial of recused cases.

A Prohibition does not lie to prevent the other Judge, not recused, from trying such cases in which his fellow Judge is recused as of counsel.

APPLICATION for Mandamus and Prohibition.

Land & Land for the Relator.

Respondents *in propriis personis.*

The opinion of the Court was delivered by

Bermudez, C. J. This is an application for a mandamus and for a prohibition.

The prayer for a mandamus is levelled at one of the defendant Judges, (Taylor) who, having recused himself as counsel in a suit before him, declines to appoint a lawyer to sit and try the case in his place.

The demand for a prohibition is formed against the other defendant Judge, (Jones) to prevent him from taking cognizance of and determining the identical litigation.

The District Judges return, arguing that their respective course is justified by law.

The Constitution in force does not contain general provisions for the trial of cases in which District Judges may be recused.

It first directs that the legislature shall provide for the trial of such cases in the District Courts, by the selection of licensed attorneys-at-law, by an interchange of Judges, or otherwise. Art. 112.

It next declares, concerning the Civil District Court for the Parish of Orleans, which is composed of five Judges, who sit separately and have a concurrent jurisdiction, that, in case of the recusation of any Judge thereof in any case, such cause shall be reassigned to some other Judge of the same court. Art. 130.

So that the powers delegated to the legislature were to be exercised solely as to District Courts outside of the Parish of Orleans.

The Constitution also provides, that the general assembly shall have power to increase the number of District Judges in any district, whenever the public business may require. Art. 110.

In furtherance of Article 112, the legislature passed Act 40 of 1880, the second section of which is to the effect, that, where a District Judge is recused in a case, except for cause of interest, he shall for the trial thereof appoint a lawyer having the qualifications of a Judge of the District Court, etc.

In the exercise of the powers conferred by Art. 110, the general assembly passed Act 71 of 1882, increasing to *two* the number of District Judges for the First Judicial District, authorizing them to adopt rules for the division into classes, and the assignment to each Judge, of the business thus classified, of the court.

Under the authority of that legislation, the additional Judge had

been elected, qualified and had entered upon the discharge of his duties when the previous Judge was recused and retired from the case.

The trial of "*recused cases*" has, for quite a long period, been a subject of embarrassment for both conventions and legislatures, and has proved a fruitful occasion for mystifying, protracted and injurious litigation, which the wisdom of law givers would seem to have proved incompetent effectually to suppress.

The framers of the Constitution have nevertheless assumed to remedy the crying evil, and, to all appearances, have practically well prescribed on the subject.

Contemplating both the actual and eventual condition of things, they have directed specially in what manner cases of that class were to be decided in a particular section of the State, and have imposed upon the legislature the duty of providing for the trial of such cases, by selected attorneys-at-law, in the other parts of the State.

At the time the Act of 1880 was passed, the District Courts throughout the State, save in the Parish of Orleans, were presided over by one Judge only. The legislation which it contains was designed to apply to the state of facts then in existence.

The motives which induced the framers of the Constitution to direct legislation for the determination of such cases by selected attorneys-at-law, no doubt were the avoiding of the injurious delays so frequently suffered before procuring the attendance of a neighboring Judge, and the securing of a speedy trial and decision of the case by a competent member of the legal profession.

It is true that they foresaw the probability, if not the certainty, of an increase of the number of District Judges in one or more Districts; but it cannot be legitimately inferred from that circumstance, that they designed that the legislation required by Article 112 should apply to cases of recusation, when the powers of the same District Court *could be exercised* by another Judge of the same court, for they had specially provided otherwise by Article 130 for the trial of similar cases in the Parish of Orleans.

If they did so expressly provide for that parish, it is simply because they had also provided that all cases before the District Court there should be allotted and assigned, and that the Judge to whom the cases would thus go, should retain exclusive control over it until its final determination.

They did not require the legislature to provide for such allotment and assignment in case of an increase of the Judges of any one District Court, and the legislature did not do so, but authorized the

Judges to adopt rules on that subject. This they did in the present instance, referring to the newly elected Judge all criminal and civil jury cases, and to the previous Judge, all other cases, provision being made at the same time for the trial of recused cases in the mode which is complained of in the present instance.

The legislature was competent to delegate the power to adopt such rules. The Judges having exercised the right, and the trial of recused cases having been covered thereby, their action is warranted and legal.

It, therefore, follows that the Act of 1880 became inoperative when the legislature prescribed for the addition of a Judge for the District Court for the First Judicial District, clothed with concurrent powers and when the office thus created was filled and the elected Judge entered upon the discharge of his functions, provided such Judge was not himself recused for some legal cause. In such a case the Act of 1880 would continue in force, and the necessity of the appointment of an attorney would still exist.

On the happening of such an event, namely: the legal recusation of one Judge and the absence of any valid recusation of the other Judge, the requirement of calling upon an attorney-at-law determines and the occasion arises for the assistance of the other member of the same court clothed with identical powers.

This construction of the Act of 1880 is in accord and harmonizes with the mode prescribed by the Constitution itself, for the trial of recused cases in the Parish of Orleans. It is legitimate, conservative, and is the result of much deliberation.

The course pursued by the defendant Judges being justified by law, it is ordered that the application herein be refused with costs.

No. 124.

CITY OF SHREVEPORT VS. FANNY ROOS.

Municipal corporations may adopt ordinances for the good order of the community, and where the power to suppress bawdy houses is conferred, the power to adopt means for that suppression follows by necessary implication.

An ordinance which prohibits bawdy houses being kept in an indecent manner need not specify the various acts of indecency which will render its keeper liable to punishment.

APPEAL from the Mayor's Court of Shreveport.

Wm. A. Seay, City Attorney, for Plaintiff and Appellee.

Hicks & Hicks for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. The defendant was tried before the mayor of Shreveport on a charge of keeping a disorderly house of ill fame in an indecent manner, and thereby causing and maintaining a nuisance, and upon conviction was fined fifty dollars, and ordered out of the premises.

The ordinances of the corporation require that houses of ill fame within the town, which shall be conducted in an indecent manner, or so conducted as to be nuisances, shall be abated by compelling the parties to abandon the premises, and power is given the mayor to close them and fine the occupant. The charter gives full authority to the council to pass the ordinances, and to the mayor to enforce them.

Copies of the ordinances are in the transcript and objection is made here that they are not signed by the mayor. It was not raised below so that the plaintiff might have been put on guard, and exhibited the signed ordinances in full. Sections only of ordinances were offered in evidence—those which related to the matter in hand—and each section was of course not signed.

The ordinances are attacked as unconstitutional, but it is not now disputed that municipal corporations may adopt laws and regulations touching the good order of the community, and where the power to suppress bawdy houses is conferred, the corporation has by implication and of necessity the power to adopt proper means to accomplish it. Dillon Munic. Corp. §§ 93 and 310.

A more serious objection is that the ordinance does not create any specific offenee, and that the phrase "conduct a house of ill fame in an indecent manner" is uncertain and vague. It could scarcely be expected that an ordinance affecting houses of this kind should specify the particular act of indecency which will render its inmates obnoxious to the law's denunciation. These acts may be so various in kind and so differing in degree, and withal so numerous, as to defy specification. The experience of the city fathers in that domain is doubtless so limited that in drafting an ordinance which should comprehend all the indecent convolutions of lascivious cyprians, they would be forced to put fancy on the wing, and imagine postures they never beheld. This would be dangerous occupation. Neither the law, nor the right of accused parties to be informed of the nature of the accusation against them, imposes such particularization upon the coporation authorities.

The prohibition is of keeping a bawdy house in a disorderly and indecent manner. The offence of keeping a disorderly house is a well recognized misdemeanor in many States, and the statute denouncing it

does not undertake to specify what particular acts shall be deemed disorderly within the meaning of the statute, nor was it ever supposed essential. In like manner this ordinance prohibiting a bawdy house being kept in an indecent manner clothes the magistrate necessarily with the discretion to determine whether the particular acts proved are indecent. We have not a doubt the mayor decided correctly in the present instance.

Judgment affirmed.

No. 103.

R. J. Looney vs. S. Levy, Jr., Liquidator, etc.

A new trial will not be granted to a party who judicially admits his indebtedness on an account set up against him, on the ground that he had not seen the detailed account before rendition of judgment in the case, and that the items and dates of said account are newly discovered evidence.

His admission of the indebtedness estops him from subsequently denying knowledge of the account.

Prescription and compensation are not inconsistent pleas. Hence, the previous plea of prescription is not waived by a subsequent plea of compensation.

An attorney's fees are due on the termination of the litigation, and prescription runs from that date. A continuity of services by an attorney, in other matters, from year to year, cannot interrupt that prescription.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

T. F. Bell for Plaintiff and Appellant:

The plea of compensation to plaintiff's claim *in globo* waives general denial, and admits the claim *in globo*. Durnford vs. Agme, 3 N. S. 270; Jones vs. Bishop, 12 La. 397; Rost vs. Byrne, 14 La. 372; Diggs vs. Parish, 18 La. 6; 14 An. 54; 22 An. 442; 23 An. 142; 25 An. 182.

He who pleads compensation must do so specifically and prove it. 11 M. 639; 1 N. S. 127-412 3 N. S. 75, 373; 6 N. S. 226-250; 14 An. 54; 17 La. 259.

The debt once admitted is presumed to be still due. 12 La 397; 18 La. 6; 17 An. 97.

Plea of part payment is inconsistent with prescription. Elmore vs. Robinson, 18 An. 651 has a retroactive effect; 17 An. 246.

The cases 11 An. 514; 32 An. 962; 7 An. 222; 11 An. 212, do not militate against the general rule.

The case of Colley vs. Latourette is specially put on the fact that plaintiff was a clerk, employed by the month at $55 per month, and the cases referred to there were contracts expiring as to times fixed. 7 An. 222; 5 La. 15; 6 N. S. 226; 14 An. 581, and in 11 An. 30 there was no point of prescription, and 12 An. 588; 14 An. 137, are not in point.

Quae temporalia sunt cannot apply. 1 Pothier Obligations, 495; Riddell vs. Gonnly, 4 An. 140; Crow vs Watkins, 12 An. 845; Dickason vs. Bell, 13 An. 249; 9 An. 169; 1 An. 35; Toullier 388, 389.

The item of $500 is not founded on the assumption of the debt of a third person, and R. C. C. 2278; 11 An. 213; 10 An. 342; 2 Hen. Dig., p. 1096, No. 6, are not applicable.

Land & Land and *Alexander & Blanchard* for Defendant and Appellee:

1. Attorney fees are prescribed by three years from date of rendition of judgment in the case, and continuity of services does not interrupt prescription. C. C. 3538; 11 An. 30 14 An. 137; 12 An. 159, 558; 7 An. 222.
2. A plea of prescription is not inconsistent with a plea of payment or compensation. 7 An 222. Nor with the general issue. 7 L. 85; 17 L. 459; 7 R. 467. In 18 An. 651, partial payment was pleaded.
3. Plaintiff having waived proof, and judicially admitted his indebtedness in open court, in the amount of the balance of account, pleaded in compensation, cannot obtain a new trial on the ground of newly discovered evidence, i. e., that the account shows that it is prescribed in part. Hennen's Digest, p. 989, Nos. 4 and 6; 19 An. 491; C. C. 2291.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff claims of the commercial firm of Levy and Bodenheimer the sum of $6,030, for professional services rendered by him as an attorney and counsellor at law.

The services are alleged to have been rendered to the firm by plaintiff as their counsel in a large number of suits, in which the defendants were parties, and for general services rendered during the years 1877, 1878, 1879, 1880 and 1881, at the rate of $350 per annum.

The defense was: first, a general denial and the plea of prescription of three years, and subsequently a plea of compensation based on a promissory note of plaintiff's of $1,128, and on an account alleged to be due by him to the firm amounting to $1,482.33.

From a judgment of $796.67 in favor of plaintiff, he has appealed for the purpose of recovering more, and the defendants move for an amendment, with a view to a reduction of the amount allowed.

We will in the first place direct our attention to a motion for a new trial urged by plaintiff on the ground of newly discovered evidence, based on the following circumstances:

During the trial plaintiff admitted that he was indebted to the defendant firm, in December, 1881, in the sum of $1,482.33. This was the amount pleaded in compensation on the score of the account due by plaintiff.

In view of that admission, the account was not introduced in evidence. The Judge, having concluded to sustain the plea of prescription of three years as to all items of plaintiff's account, which dated three years back, he compensated the balance of the amount found in favor of plaintiff by the account of $1,482.33 *pro tanto*. Plaintiff contended that the account should be imputed in compensation to the prescribed items of his claim *pro tanto*, which the Judge declined to do, for lack of any evidence to show that said account, or any portion thereof, was concurrent or contemporaneous in dates with his prescribed claims.

After trial, plaintiff procured the detailed account of the defendant firm, which ran from 1873 to 1881, both inclusively, and urged that he had discovered the details of the account since the trial, and that he was thereby entitled to a new trial.

In making the admission of his indebtedness to the defendant firm, in the precise amount of the account which he subsequently annexed to his motion for a new trial, plaintiff must have known whereof he spoke, especially as he had added in his admission the statement, that this admitted indebtedness "appeared by open accounts on their books," referring to the defendants. This admission is an effective estoppel of any denial on his part of previous knowledge of the account. The new trial was properly refused.

The main contention on the merits of the cause turns upon the effect of the subsequent plea of compensation, on the previous plea of general denial, and of prescription.

Plaintiff's contention is, that the two pleas are incompatible, and that the plea of compensation made *in globo* to his account, amounts to a formal waiver of the plea of prescription, and admits the existence of the debt.

In their plea of compensation the defendants used the following restrictive language: "That the said late firm is not indebted to said plaintiff in a larger sum than the principal of said account and note and interest, which respondent now pleads in compensation, without, however, admitting that said firm is indebted unto said plaintiff in a larger aggregate sum than the amounts of said account and note."

The Judge correctly ruled that the two pleas were not inconsistent, and that the plea of compensation admitted no part of plaintiff's account, but the amounts equal to the account and note pleaded in compensation, as shown by the cautious and guarded language used by respondent in his plea of compensation.

This ruling is in harmony and in keeping with our jurisprudence on this subject. Colley vs. Latourette, 7 An. 222; Durham vs. Williams, 32 An. 962.

In the last mentioned case, we made an extended review of our jurisprudence on the subject of apparently incompatible pleas, and of the effect of such pleas when made in the alternative, as in the instant case. It would be useless to repeat here the reasoning which we used in that case.

We find also, that the District Judge correctly held that the continuity of an attorney's account for services from year to year could not be invoked as a means of interrupting prescription, as his fees are due

and exigible at the termination of each litigation. Hiestand vs. Labatt, 11 An. 30; Morgan vs. Brown, 12 An. 159.

The evidence satisfies us that the services, the payment of which is not prescribed, were reasonably worth the charges made therefor. The Judge correctly held that the note pleaded in compensation by defendants, which was due on January 4th, 1882, was presented, and that, as prescription had accrued at the time that plaintiff's account began, the rule *quae temporalia sunt, etc.*, did not apply.

After an exhaustive examination of the case, and much reflection and ripe deliberation, we find no error in the judgment appealed from, except in the following particulars:

The District Judge found that the item for general services for the year 1879 was prescribed.

That item was not due before the 31st December, 1879, and the suit was filed on the 18th of December, 1882; hence, three years had not elapsed between the maturity of the item and the date of the judicial demand.

It is, therefore, ordered and decreed that the judgment of the District Court be amended by increasing the sum from $796.67 to $1,146.67 (eleven hundred and forty-six 67–100 dollars) and that, as thus amended, said judgment be affirmed at defendants' costs in both Courts.

No. 114.

The State of Louisiana vs. Richmond Stuart.

If it appears in a criminal case, from the indictment or other portions of the record, that the grand jury had been duly empannelled and sworn, and otherwise legally organized, it is sufficient. The minutes of the court are not the exclusive mode of proving such facts.

The fact that one witness is not allowed to prove a confession made to him by an accused, because inducements had been held out by that witness, will not be good ground to exclude a confession made by the same accused a short time thereafter, to another witness, who had made no threats or held out no inducements in order to draw out the confession.

In cross-examining a witness for the defense, the State will be allowed to propound questions growing out of facts and circumstances stated in his direct examination by the witness, even when it appears that the witness had been introduced for a different and exclusive purpose.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

M. S. Crain, District Attorney, for the State, Appellee.

1. A confession will not be excluded where there is a mere adjuration to tell the truth, unaccompanied with a threat. 2 Russ. 286; 34 An. 18.

2. Though confessions are unduly obtained, subsequent confessions as to the same fact, if the court believe, from the circumstances, that the influences have been removed, etc. State vs. Hosh, 12 An. 895.

3. In criminal matters the competency of a witness depends upon his intelligence, reason, judgment, capacity, and understanding, which are all matters left to the discretion of the Judge and jury. S. vs. R., 18 An. 340-2; 19 An. 119.

E. H. Randolph and *H. H. Childers* for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Appealing from a conviction of murder and a sentence of death, the defendant relies on alleged irregularities, which he presents in an assignment of errors and two bills of exception.

1. In his assignment of errors, he charges that the record fails to show that the grand jury, which presented the indictment against him, had been duly empannelled and *sworn* as the law directs.

The minutes of the court show that the grand jury was empanelled and charged, but are silent on the question of the oath prescribed by law. The minutes contain the names of all the grand jurors and of the foreman, and mention the fact of the latter's appointment by the court.

The indictment which is endorsed, a "true bill," by the foreman of the grand jury, contains the distinct statement that the members had been "duly empannelled and sworn."

Hence, the record does show that the grand jury had been sworn. But defendant's contention is, that this fact must be shown by the minutes only. He is in error. The proof of that fact may be gathered from any other part of the record.

This is no longer an open question. In the case of the State vs. Tagwell, 30 An. 884, this Court, passing on a similar objection, said: "we do not consider it sacramental, that these preliminary proceedings for the organization of the grand jury should be copied in the record." This ruling was reaffirmed in the case of the State vs. Watson, 31 An. 380.

The reliance placed by defendant's counsel on the ruling in the case of the State vs. Folke, 2 An. 744, cannot avail him. In that, as in the instant case, the minutes failed to show that the grand jurors had been sworn, and this Court sustained the action of the District Judge, who had allowed an amendment of the minutes of his court, with a view to supply the omission of the clerk in that particular. And this Court further said: "In the present instance, it appears upon the face of the indictment that the jurors by whom it was found were duly empannelled and sworn, and the oath of the clerk further confirms the fact."

This ruling is far from supporting the construction that the minutes

of the court are the exclusive mode of showing that the grand jury had been regularly organized.

2. The first bill complains of the Judge's ruling in admitting proof of a confession of the accused, for which purpose the State offered the testimony of two witnesses.

The testimony of the first witness was excluded on defendant's objection, that the confession made to him was not voluntary, but that the same had been drawn out by inducements.

In another part of the bill the Judge states, that he rejected that witness for the reason that he was too intoxicated to testify in the cause.

Defendant's counsel seriously complains of this discrepancy in the statement of the Judge's reasons for the exclusion of that witness. It is very apparent that the two reasons are somewhat inconsistent, and exclusive of each other. The Judge seems to rest his ruling on the state of intoxication of the witness.

However, be that as it may, we find no ground of complaint for the accused of a ruling which silenced a witness who had been introduced by the State with the avowed purpose of proving a confession calculated to operate his conviction of murder.

Defendant's counsel objected to the proof of the confession by the second witness introduced for the purpose, on the ground that the confession was made a short time after the excluded statement, and under the same pressure. The bill shows that the second confession was made to a different person some forty minutes later, and nothing shows that any threats are made, or inducements held out to the accused by this second witness. Hence, the District Judge correctly held that the confession was voluntary, and that proof of the same was admisaible. Should it even appear that the second confession was a continuance of the first, or was made under the same state of mind of the accused, we are not satisfied from any fact in the record that the first confession was not free and voluntary, and that it should have been excluded. The record does not inform us as to the nature of the inducements held out to the accused. State vs. Alphonse, 34 An. 18.

3. The defendant finally complains of the ruling of the Judge in allowing the District Attorney to cross-examine one of the witnesses for the defense, on matters alleged not to grow out of facts and circumstances stated in his direct examination.

It appears that the defense had questioned the witness concerning the state of excitement and indignation prevailing among an assemblage of persons who had gathered on the banks of a stream into which

the body of the murdered person was supposed to have been thrown. And it further appears that, in the course of his examination in chief, the witness had stated that the body had been found in the stream, and had been dragged out by the witness himself. On cross-examination, the witness was asked by the State whether he had examined the body; whether he had identified it, and whether he had found any evidence of violence on the body. These are in substance the questions objected to by the defense, on the grounds hereinabove stated.

Admitting that the witness had been introduced, as contended for by the defendant's counsel, for the exclusive purpose of showing public excitement and indignation, it appears nevertheless that the witness, in his examination in chief, had made statements concerning the search for the body in the water, the finding of the same therein, and the dragging of it therefrom by the witness himself.

It is therefore clear to our minds, that the matters embraced in the questions on cross-examination were intimately connected with, and naturally grew out of, the facts and circumstances stated by the witness in his direct examination.

The legality of the cross-examination in this particular, must be tested by the matters stated by the witness in his examination in chief, and not by the consideration of the purpose for which he had been introduced. State vs. Swayze, 30 An. 1327.

A close and careful examination of the case has failed to disclose any errors in the proceeding prejudicial to the accused, and we can therefore grant him no relief.

Judgment affirmed.

No. 112.

Dempsey Eatman vs. New Orleans Pacific Railway Company.

A railway company is responsible for the damages occasioned by its failure to make road crossings.

When the right of way is granted on the expressed condition of making such crossings, and with the stipulation to that effect, the company will be held to the performance of its contract, and muleted for its violation.

Attorney's fees are not recoverable in an action for damages when the act complained of is not tainted by fraud or malice.

APPEAL from the Tenth District Court, Parish of DeSoto. *Logan*, J.

E. W. Sutherlin and *J. L. Seales* for Plaintiff and Appellee:

1. Interrogatories to absent witnesses must be signed by the party or his counsel. Depositions are not admissible when the witnesses are not named in the petition, or order for

commission. The order for commission is premature, if rendered before the expiration of three days after the interrogatories have been submitted or notified to the adverse party. C. P. 425, 426.

2. The measure of damages, in case of failure to comply with a long continuing agreement, is the value of the obligation. Sedgwick Vol. 1, p 200, note; p. 202; 4 Peters, 172; 11 An. 39; Sedgwick Vol. 1, pp. 192-3; 35 An. 202.
3. The rule is well settled, that a party cannot prove what he has not alleged. A plea of the general issues is absorbed and overshadowed by, and subordinate to, the special defences with which it may be joined. Evidence of tender is not admissible under the general issue, or under special defences, joined thereto, with which it is inconsistent. 9 An. 119 and cases there cited; 20 An. 306; 21 An. 377; 18 An. 660; 19 An. 43; 28 An. 917; 31 An. 81; 12 An. 739; 14 An. 868; 29 An. 134; 9 An. 528.
4. In case of long continuing agreements, covering a long space of time, if the failure to comply with the original contract is such, that the plaintiff, at all events, is entitled to nominal damages, the plaintiff can recover damages for the consequences of the failure, and immediately traceable to it, although the damages may have accrued since the institution of the suit. 4 Peters, 172; Greenleaf Vol. II, p. 268; Sedgwick Vol. I, p. 199; 2 Greenleaf, 257.
5. When the debtor may be charged with fraud, or when the debtor fails to comply with his obligation, or delays its performance, "by fraud and on affected contumacy," or when the circumstances are wanton, wilful, vexatious, and aggravating, the damages are to be estimated rigorously, and extended to every kind of damage, of which the acts complained of are "efficient cause," including the plaintiff's expenses for loss of time, extra trouble, and counsel fees for prosecuting suit in order to ascertain the damages. Legal fiction should never be permitted to work injustice. C. C. 2315; C. C. 1928, Secs. 2, 3; 24 An. 1; 2 Greenleaf, 268; Pothier, Vol. 1, c. 2, Art. 3; 13 An. 193; 12 An. 714; C. C. 2482; 19 L. 357; 13 An. 449; 14 An. 311, 757, 826; C. N. 1630; 2 An. 868; 24 An. 251; 10 An. 10; 33 An. 392; Sedgwick, Vol. I, pp. 177, 182, 183.
6. It is neither the province nor the prerogative of the Judge to give to the jury, in charge, abstract propositions of law, foreign and extraneous to the issues and facts presented on the trial. Thompson on Charging the Jury, pp. 88-89, 91-2-3.
7. "The deed of a corporation, executed by its officers in its behalf, is presumed to be its deed." The power of the corporation may be conferred by previous authority or by subsequent ratification. "The ratification may be express, or implied from the acceptance of the benefit of the transaction." Pierce on Railroads, pp. 33, 34, 521.
8. In actions, sounding in damages for breach of contract, or failure to comply therewith, or for torts, the verdict of the jury, estimating the damages, will not be disturbed unless palpably erroneous. 18 An. 26; 19 An. 362; C. C. 1928.

Moss, Andrews & Foster for Defendant and Appellant:

A contract which binds a party to do or perform a certain thing, and he neglects or fails to carry out and do the thing contracted for, he is guilty only of a passive breach. R. C. C. 1930. When the breach is passive only, damages are due from the time the debtor is put in default, in the manner directed by law. R. C. C. 1933.

In an action for damages for the non-compliance with a contract, plaintiff must prove that he put defendant in default in one of the modes pointed out by R. C. C. 1911, Nos. 1, 2, 3; 1 L. 98; 5 L. 414; 14 L. 80; 9 R. 495; 16 An. 389; 17 An. 32; 30 An. 1126; 31 An. 164.

The putting of defendant in default is an indispensable prerequisite to a recovery of damages on a passive breach of contract. 5 R. 83; 10 R. 524; 11 An. 300.

The debtor can only be put in default:

1. When it is agreed that the party failing to comply shall be so by that mere act.
2. When a specific performance is demanded, either by commencement of a suit (for that purpose) by a demand in writing, by protest made by a Notary Public, or by verbal request made in the presence of two witnesses.

3. By operation of law. R. C. C 1911, Nos. 1, 2, 3; 9 R. 495; 30 An. 1126.

The want of default need not be pleaded *in limine*, but may be taken advantage of at any stage of the proceedings. R. C. C. 1912; 3 R. 400.

The rule of damages provided in cases of quasi contracts, and offences, and quasi offences, is not applicable to this case, and the Judge and jury were limited in assessing damages to the provisions of Civil Code, Art. 1934, and §§ 1 and 2. Damages arising from the passive breach of a contract, are measured by the loss sustained, and the profits of which one is deprived. C. C. Art. 1934; 17 An. 239; 11 An. 300; 29 An. 288.

Only actual and direct loss can be considered in suits of this kind, and not remote and speculative damages. The damages to be considered must directly result from the violated contract, and be actually sustained in consequence of its violation. Evidence of a vague and conjectural character is not proof of damages. 1 Howard, p. 35; 1 An. 375.

Damages must not only be direct and immediate, but they must be proved and established with precision and certainty. It is not sufficient to make them probable. H. D. p. 524, *(a)* Nos. 1 and 2; 16 An. 121; 21 An. 185.

Remote, consequential, and speculative damages, such as inconvenience and loss of time, are not actionable, and are not to be considered in a suit for recovery of actual damages. 13 An. 564; 8 An. 477.

No party can recover when he is in fault, and contributed to the damage and loss by his own acts. If one can avoid any damages it is his duty to do so, and if he fails to do so, it is his fault and he cannot recover. 30 An. 1359.

Attorneys' fees are not allowable in an action of this kind. Sedgwick Vol. 1, 7th ed. p. 45, 179, 181; Mrs. S. C. Day and Husband vs. N. O. P. Ry. Co., 35 An.

Plaintiff, not suing for the specific performance of the contract, nor for the value of the crossings, cannot recover for passive breach, unless it is shown and established that he sustained damages by the breach.

The opinion of the Court was delivered by

MANNING, J. The suit is for the recovery of $750 as damages resulting from the failure of the defendant to construct road crossings and cattle guards—$75 for crops destroyed—$50 for wages to men hired to guard the premises—two small sums for other damages, and $150 as attorney's fees—$1037.50 in total.

The defence is a general denial with the special pleas of contributory negligence, and want of authority in the defendant's agent to make the contract, the breach of which is complained of. This last plea has been abandoned.

In 1881 the Railway Company applied to the plaintiff for the right of way through his plantation. It was granted for the consideration of one dollar and the performance of certain agreements by the defendant, of which the one now claimed to have been violated is that the Company "in accepting this sale of the right of way agrees and promises to construct all necessary road crossings and cattle guards."

The line of the railway passes directly through the plaintiff's plantation, which contains one thousand acres, a distance of a mile and a half and entirely through the enclosed part of it. It divides the land in two nearly equal parts. There are three hundred and fifty acres of

land cleared and cultivated, and the road so divides the cleared land that on one side are about one hundred and twenty acres with dwelling and the out houses, stables, ginhouse, a steam saw and grist mill, and seven cabins, and on the other side two hundred and thirty acres and three cabins, pastures for stock, springs and water courses. The land is rolling so that the road-bed is for the most part either on an embankment or over an excavation. Its construction destroyed five plantation roads. The Company made no crossings but dug ditches in some places along the line of the bed, so that road crossings could not be made where the old established plantation roads had been. Wagons could not be driven from one side to the other without taking circuitous routes, and laborers with their teams and plows or vehicles could not pass across unless over the crops in cultivation, or between the piers of trestles and in the bottom of the branches which they spanned.

The plaintiff was not slow in bringing this grievance to the knowledge of the defendant. He repeated his complaints frequently, and importuned the Company to comply with its obligation to make the road crossings. He went over the line with one of the engineers and pointed out the places where the crossings were needed. None were made. His complaints were unheeded, and his demands for the performance of the contract were evaded. He could obtain neither redress nor promise of redress. An engineer went to the plaintiff's residence once on Sunday to confer with him about his complaints, but it seems that he is a Sabbatarian and would not talk on business on that day. Afterwards the engineer offered to build three crossings which the plaintiff deemed insufficient, but even these were never constructed. He would have made the crossings himself, but on signifying his purpose to do so to the engineer he was told that he would infringe the rights of the Railway Company. He had no other recourse than to bring suit.

The evidence abundantly establishes the quantum of damage claimed, and the right of the plaintiff to recover is well recognized. Mill's Eminent Domain, 214. Indeed, three witnesses who personally knew the land and its altered condition, and who speak intelligently, concur in saying that the estimate is low. The servants of the defendant took possession of the plaintiff's stock pasture, tore the curbing from the spring, burned or otherwise destroyed his fence rails, and permitted their own cattle to run at large upon the fields and depredate the crops. Remonstrances were vain. He hired a man to guard the premises who daily rode up and down the line of work remonstrating with the defendant's laborers, but

who found it impossible to guard the whole line. While at one end of the line, stock would be depredating at the other, and once he caught some of them and confined them in the plaintiff's enclosure, and a fiery encounter nearly ensued. The damages allowed are not excessive except in the matter of attorney's fees which are not recoverable in a suit of this character, where the act complained of is not tainted by fraud or malice. 1 Sedgwick's Damages, pp. 45, 179, 181; Stewart vs. Sowles, 3 Ann. 464; Williams vs. Barton, 13 La. 406.

There are several bills taken to the introduction of certain evidence, and objections to the regularity of execution of commissions to take testimony, which we do not notice because outside of this testimony taken under commission, and considering only that heard without objection, the plaintiff has established his claim to our entire satisfaction.

There was error in giving judgment for $150 for attorney's fees, and it must be amended in that respect.

It is therefore ordered and decreed that the judgment of the lower court is amended by reducing the sum named therein to eight hundred and eighty-seven dollars and fifty cents, and as thus amended that it is affirmed, the plaintiff paying costs of this appeal.

No. 108.

MRS. ANNA M. BEALL VS. SUCCESSION OF DAVID J. ELDER.

As long as executors have not been discharged, they are amenable to a suit to revive a judgment obtained against the deceased testator.

The cancellation in part of the judicial mortgage, securing the judgment as to stated real estate, does not amount to the extinguishment of the judgment sought to be revived. The security may be abandoned or lost, but the debt continues to exist until extinguished. Such defenses can only be urged in an hypothecary action.

In a suit to revive, the only questions are, was a judgment rendered; was it extinguished, and if not, is the suit to revive in time?

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

T. F. Bell for Plaintiff and Appellee.

Land & Land for Defendants and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action to revive a judgment.

The defendants, White & Tomkins, on whom citation had been served as *executors* of D. J. Elder, excepted on the ground that they were no longer such functionaries; that the succession entrusted to them had been finally wound up, and that they had ceased to be its representatives *prior* to the institution of this suit.

Upon the overruling of that preliminary defense, the defendants pleaded the prescription of ten years, and that the judgment sought to be revived, and the judicial mortgage resulting therefrom, were cancelled and erased.

From an adverse judgment the defendants and a third person, not originally a party, have appealed.

ON EXCEPTIONS.

The defendants have not shown that, at the time of service of citations on them, they had been discharged as executors of Elder.

The record shows that they filed a provisional account, which was never followed by a final account and tableau.

Nothing shows that the universal legatees, or heirs of Elder, have been put in possession of his estate.

Is is true, that his succession appears to have been thoroughly insolvent; that its assets were realized and distributed; that there was no necessity for the filing of a final account, and no occasion for the putting in possession of the heirs; but it does not follow, from these circumstances, that the executors, whose term does not, *as formerly*, expire with the year after appointment, became *functi officio*, and were consequently discharged, and ceased to be no more amenable to the Court as the legal representatives of the succession.

They could have been ruled to inventory newly discovered property; or to render a final account; or to produce vouchers to show how far the funds realized had been distributed, or like purposes.

They surely could be sued to revive a judgment obtained against Elder.

The exceptions were properly overruled.

ON THE MERITS.

The only questions to be decided were:

Was a judgment originally rendered against Elder?

Was that judgment in existence, in whole, or in part, at the institution of this suit to revive? 29 An. 69; 30 An. 692, 1330; 31 An. 326, 341; 33 An. 341.

The evidence shows that the judgment declared in the petition had been legally rendered, and that the suit to revive was brought, and the citations served, within ten years following the rendition of the judgment.

The defendants have failed to show its extinction in any of the modes prescribed by law.

It may be true, as is claimed by them, and by the third party appellant, that the judicial mortgage which resulted from the registry of the judgment was cancelled, as to certain lands acquired by the third party appellant after the averred cancellation had taken place, and that an action to rescind the cancellation may be prescribed by ten years; but it does not follow that the cancellation of the mortgage has extinguished the judgment. An abandonment or loss of the security of a debt is not equivalent to a remission of the debt itself.

Such questions can arise only in the hypothecary action brought to enforce the judicial mortgage, by which payment of the judgment is, it is claimed, still secured.

They find no place in the present controversy.

The theory of the defense, and the line of argument of the distinguished counsel of the appellants, is practically levelled, more against the uselessness of reviving a judgment which has little or no prospect of ever being satisfied, than against the right of the creditor of having it revived, which cannot successfully be resisted. The judgment may well be revived, and the mortgage which once secured it may long since have terminated, so that the property of the debtor, then affected, may have passed unencumbered to a third person.

We have read with interest the elaborate opinions of our learned brother of the District Court, overruling the exceptions and the defense on the merits, and find them substantially consonant with law and jurisprudence.

The judgment of revival however contains an error, no doubt clerical, which should be corrected. It allows *eight* per cent interest, instead of the *legal* interest specified in the original judgment.

It is, therefore, ordered and decreed, that the judgment appealed from be amended by striking therefrom the word *eight*, and substituting thereto the word *five*, and that thus amended it be affirmed at the cost of the plaintiff and appellee.

No. 122.

SUCCESSION OF EMMA McDOWELL.

This Court has no jurisdiction over an opposition to an executor's account, when the amount claimed is less than one thousand dollars, and there is no other fund to be distributed. Succession of Duran, 34 An. 585, affirmed.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

J. L. Hargrove for Opponent and Appellant.

Land & Land for the Executor, Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The executor moves to dismiss the appeal of the Wheeler & Wilson Manuf'g Co., taken from a judgment rejecting their demand to be placed on the account presented by him.

It is insisted that the amount claimed by the opponents being $75, and constituting the fund to be distributed, this Court is without jurisdiction *ratione materiæ* over the controversy.

The account proposed a distribution of quite a large sum. That distribution was opposed by the Company, with a demand to be placed on it for the sum stated: $75.

The court rendered a first judgment homologating the account and directing a distribution of the funds on hand. By the same judgment, the executor was instructed to retain a sufficient sum of money to pay the claim of the opponent, should the same be thereafter allowed, and the opposition was reserved for future adjudication. There were abundant funds to pay all subsequently; the opposition was taken up, tried and rejected with costs.

The opponent then appealed from this last judgment, the previous one remaining unquestioned.

It is evident that the only fund which can be ordered to be distributed is that reserved to meet the claim of opponent, which is $75.

The case cannot be distinguished from that of the succession of Duran, 34 An. 585, in which we held, that where there was a judgment homologating an account of administration, as far as not opposed, which has become final, and where the only opposition thereto was a claim for less than one thousand dollars, $1000, this Court had no jurisdiction to determine the merits of the controversy.

The subsequent ruling of this Court in the Renshaw case, 34 An. 1140, cannot avail the opponent. The Court there held, that, although the claim of the third opponent was for one thousand dollars, to be

paid out of the proceeds of sale, $12,500, the controversy involved a distribution of that last amount, which had not previously been ordered to be distributed.

The motion must prevail.

It is, therefore, ordered that the appeal herein be dismissed with costs.

Poché, J., dissents, adhering to his opinion in the Duran case.

DISSENTING OPINION.

POCHÉ, J. For the reasons given in my dissenting opinion, in the case of the succession of J. M. Duran, I dissent from the opinion and decree of the majority of the Court in this case.

No. 111.

R. T. COLE vs. WM. H. THOMPSON ET ALS.

The State of Louisiana, during the late war between the States, preserved her autonomy, and possessed a fully organized government.

She did not forfeit her title to the swamp lands previously acquired, by becoming a member of a Confederacy at war with the United States. During the pendency of the war she had the power to sell her lands, and her officers, charged with such duties, to make the sales, and the purchasers acquired valid titles, if the State laws relating to such sales were complied with.

There is a legal presumption, that all swamp lands were surveyed before their selection was approved by the general government. The law required them to be surveyed before presented for approval, and the officers charged with approving them are presumed to have done their duty.

The same presumption exists in case of entries, under the State preëmption laws, that the conditions have been complied with, and it is only the conclusive evidence that can overthrow such presumptions.

Where plaintiff and defendant both hold title from the State, the first purchase must prevail, if not successfully impeached.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

Wise & Herndon for Plaintiff and Appellee:

1. The Act of March 3d, 1857, confirmed to the several States their selections of swamp lands, which had then been reported to the commissioner of the general land office, so far as the lands were then "vacant and unappropriated, and not interfered with by an actual settlement" under existing laws. U. S. R. S. 2484.
2. The selections so confirmed could not be set aside, nor could titles to any of the land which they embraced, unless it came within the exceptions mentioned in that act, be thereafter conveyed by the United States to parties claiming adversely to the swamp land grant. 7 Otto, 97; U. S. R. S. 345.
3. By the confirmation by Congress, on the 3d of March, 1857, of the selection made by the State of Louisiana, granted to her by the Act of Congress, approved March 2d, 1849, and the Act approved September 28th, 1850, and by the Act of the State No. 104, on page

245 of the Acts of 1871, confirming all sales and collections of public lands made by the State, from the 1st of January, 1861, to the 14th day of October, 1864, the land in controversy, in this instance, was severed from the public domain, and the subsequent grant thereof by the United States in no manner impaired or defeated the title previously acquired by the State and transferred to Williams in due form of law, at that time in full force, and afterwards confirmed. See Acts of 1861, No. 267; 1871, Act No. 104, p. 243; Marks vs. Martin, 27 An. 527.

4. Both plaintiff and defendant claim title from a common author, the State of Louisiana. The plaintiff's title being the oldest and of equal dignity with defendant's must prevail. 3 Rob. 293; Scott vs. Prudenhomme et al., 10 An. 515; Bell vs. Hearne, 1 An. 249; 4 An. 267; 5 An. 677; 6 An. 773; 7 An. 445.

Land & Land for Defendants and Appellants:

1. The patent from the State held by the defendant is the legal title and must prevail, unless plaintiff shows a prior equitable title, good in law and indefeasable by any action of the land department. 14 An. 772; 15 An. 237.
2. The Receiver's receipt, issued to plaintiff's author in March, 1862, by the alleged Confederate Register, at Natchitoches, under the State preëmption act of 1861, was null and void, because the land entered had not been surveyed into legal subdivisions, and was not so surveyed until 1871, nor had the land been offered for sale by the State Government, or by the United States, as expressly required by law, State and Federal.

There is no legal proof of the official capacity and authority of the alleged Confederate Register to sell the land; and the Court cannot notice the fact of his appointment and qualification without proof. Buford vs. Johnson, 10 R. 456; Succession of Grant, 14 An. 795.

Payment of the price did not vest any equitable title in the purchaser. 4 An. 458.

3. As a patent is superior in dignity to a Receiver's receipt, the maxim of *prior in tempore potior in jure* does not apply. H. D. 1271-2. Plaintiff, having failed to show any facts beyond the bare payment of the price to support his claim, the patent must prevail. 4 R. 79; 20 An. 439.
4. The pretended preëmptor was never in possession of the land in dispute, never resided thereon, and on the very day of entry sold to a third person at a profit of 250 per cent. The *onus probandi* was on plaintiff to show a legal entry, and title good against the world, or such a state of facts as would give him a good title in equity against the patent. The legal presumption is in favor of the patent.
5. Act 104, of 1871, did not confirm all sales and locations made during the late war—but only those of record in the State Land Office at New Orleans.

Plaintiff was bound to show such record affirmatively, to entitle him to the benefits of the act. See sec. 12, of Act 104 of 1871.

6. In Marks vs. Martin, 27 An. 527, there was no conflict of titles derived from the State of Louisiana, no question of surveys and offerings for sale by the government, no dispute as to the confirmation and registry of title under the Act of 1871, no contest, in fact, as to the derivation of the plaintiff's title from the State—but the ownership of the State under the Act of 1849, was the sole point at issue and only question decided. The land was in a different section, township and range.

The opinion of the Court was delivered by

TODD, J. This case presents a controversy between plaintiff and defendant respecting the land described in the petition as the N. E. ¼ Section 1, T. 20, R. 15, situated in the Parish of Caddo.

Both parties claim to have acquired it from the State, it being swamp

land and embraced in the donations of swamp lands made to the State by the United States under sundry Acts of Congress.

The plaintiff claims under an entry made on the 17th of March, 1862, by Chesley C. D. Williams, and several mesne conveyances from him.

The defendant claims under an entry made in 1878 and a patent issued the same year.

The plaintiff's title being the oldest, must prevail, unless successfully impeached. It is assailed on several grounds, which are thus stated in the brief of defendant's counsel:

1. In 1861 the land in dispute was *unsurveyed*, and belonged to the public domain of the United States, and the State government, organized in Louisiana at that time, had no power or authority to sell said land.

2. Because the pretended Receiver, who issued the receipt sued on, had no authority or power to sell said land, either as the property of the United States or of the State of Louisiana.

3. Because said pretended sale was never recorded on the maps of the State Land Office, as expressly required by law.

4. Because, in 1861, the said land was not subject to sale or entry, and the said Williams entered said land not for himself, but for R. T. Noel, in fraud of the laws of the United States and of the State.

These several grounds we will proceed to consider:

First. If the land in 1861 belonged to the United States, then neither party has a title to it, as both claim from the State, and the only title ever acquired by the State was under the swamp land acts of 1849 and 1850, and approvals of the selections made thereunder, either by the Secretary of the Treasury or other proper officer, or by Act of Congress.

Approvals of the selections were made in 1852 by the Secretary of the Treasury, and subsequently, in 1857, by Act of Congress, and embraced the land now in dispute. These approvals covered all lands donated to the State, selected up to those dates, whether surveyed or unsurveyed, although, as will hereafter appear, the Acts contemplated that the lands would be surveyed before selected, and the approvals created a presumption that they were so surveyed.

If the lands in question belonged to the State at that time, and there was no legal obstacle in the way of the sale, by reason of some provision of the State law, the State had the power to make the sale, under its government as then organized. It is true that, at the time, the State was a member of a Confederacy then at war with the United States, but that fact worked no forfeiture of title to her lands or any other property within her limits. The State had preserved her au-

tonomy complete, possessing a government fully organized, each department thereof in the full exercise of all its powers and functions, and whose existence was in no manner affected by the state of war then existing.

Therefore, the State had the power to sell its lands.

Second. As to the authority of the Receiver to allow the entry and issue the certificate, it depended upon the provisions of the State law regulating the sales of the public lands. His capacity was sufficient, as an officer of the State government in charge of the land department, and the only question is, whether, in thus disposing of it by entry, he violated any law of the State.

It is urged that this land was not subject to sale by private entry or under the right of preëmption at that time, because, as alleged, it was then unsurveyed. This seems to be the main point in the controversy.

The Act 267 of 1861 forbade the sale of any public land, unless it had been offered for sale at public auction, by legal subdivisions, by the State, or had been so offered by the U. S. Government, and by same Act entries by preëmption right could not be made before the lands were surveyed. This implied that no title could be acquired of the unsurveyed lands.

As stated before, the approval of these swamp lands to the State created the presumption that they had been surveyed.

The 2d section of the Act of 1849 authorized the Secretary of the Treasury to approve certified lists of swamp lands which had been surveyed by the State. The survey being a prerequisite to such approval, the legal presumption arises that it had been complied with, the approval having been made.

The counsel for the defendant, however, urges that this presumption is not conclusive, and that they have shown by proofs in the record, that the surveys were *not* then made. They point us to the survey made in 1872, called Parson's Survey, as establishing this fact. This only proves that a survey of the Township embracing this Section was then made, but that is not conclusive against a prior survey having been made. That a survey of the whole Township, or of part of it, must have previously been made in 1840, appears from an abstract of the records of the U. S. Land Office, which shows that, on the 27th of January of that year, the whole Township purports to have been offered at public sale, which, of course, pre-supposes that the whole of it had, even at that time, been surveyed. We refer to this in this connection, as establishing that more than one survey of the same lands may have

been made, but not as conclusive evidence that the land in dispute was at that time surveyed.

The counsel of the defendant contend that the whole Township could not then have been offered, for a map or plat of the lands accompanying the abstract referred to shows that the Section embracing this land could not have been offered and had not then been surveyed, because the area or number of acres of the Section is left blank. On the other hand, we are pointed to another abstract in the transcript, showing that partial surveys of this Section were made as far back as 1837 and 1839.

Under this state of facts, we are not satisfied that the evidence submitted conclusively establishes that no survey of the lands had been made at the date of the plaintiff's entry, or, in other words, that the legal presumption, arising from the approval of the lands on the part of the general government, has been rebutted. Giving full effect to the apposing proof, the several abstracts offered, *non constat* that there might not have been a survey of the land between 1849 and 1871, admitting that none was made previous to the year first mentioned, though no evidence of the same may appear in the record, the abstracts from the land office records, found in the transcript, do not purport to comprise all the entries relating to the land in controversy.

Third. It appears that the entry of Williams, under which the plaintiff claims, was recorded in the office where it was made. If it was a valid entry, and the title to the land passed thereby, this title could not be divested by a failure to record in the office subsequently established; such failure could only raise the question whether the entry was ratified by the effect of Act 104, Sec. 12, confirming sales of land made by the State from the 1st January, 1861 to the 14th October, 1864.

Fourth. As to the land being entered by Williams for the benefit of another person, and in fraud of the laws of the State, it is sufficient to say that the evidence does not establish this. In the absence of such proof, the presumption must prevail that the officer did his duty, and issued the certificate, upon being satisfied that all the conditions for the entry had been complied with by the party in whose favor it was issued.

In addition to the above, we would state that, although the plaintiff claims title from the State upon the certificate of entry, an extract from the records of the land office where the entry was made, found in the transcript, shows that a patent for the land was subsequently received at that office. We think it was competent to establish this

fact by the extract referred to, and without the production of the patent itself.

In regard to the matter of improvements, we have carefully examined the evidence relating thereto, and think the Judge below did substantial justice between the parties.

Judgment affirmed.

No. 106.

THE STATE OF LOUISIANA VS. JACQUES AND LAURENT CHRÉTIEN

Testimony offered to show that a co-defendant, in a case of larceny, and a fugitive from justice, called upon and induced the prisoner to assist him to go after the property stolen, is not *hearsay*, but original evidence. The facts sought to be proved form part of the *res gestæ*, and were susceptible of legal proof.

APPEAL from the Twenty-first District Court, Parish of St. Martin. *Fontelieu*, J.

C. N. Mouton, District Attorney, for the State, Appellee.

Edward Simon for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant, Laurent Chrétien, was prosecuted for the larceny of a beef, convicted and sentenced to four months' imprisonment, at hard labor, in the State penitentiary, and one dollar fine and costs.

From the judgment and sentence he appeals to this Court.

Record contains bills of exception, a motion in arrest of judgment, and a rule for a new trial.

The first bill relates to the refusal of the Judge to permit the defendant to prove that his co-defendant, Jacques Chrétien, then a fugitive from justice, had called on and induced him to assist him to go after the beef.

The Judge ruled out the evidence on the ground that the same was *hearsay.*

The accused claims that it is not such; that he had a right to have said facts proved as part of the *res gestæ*, and the declarations of his co-defendant ascertained, so as to place him in the real attitude he occupied in the matter.

The term *hearsay* is frequently applied to that which is really not so, in the sense in which that term is generally used. Thus, where the inquiry is into the nature and character of a certain transaction, not only what was done, but also what was said by those present during

the continuance of the transaction, is admissible. But this is not *hearsay* evidence. It is original evidence of the most important and unexceptionable kind. In this case, it is not a second hand relation of facts which is received, but the declarations of the parties to the facts themselves, or of others connected with them in the transaction, which are admitted for the purpose of illustrating its peculiar character and circumstances.

The declarations of third persons are not admissible as part of the *res gestæ*, unless they in some way elucidate or tend to give a character to the act which they accompany, or may derive a degree of credit from the fact itself. If they can have no effect upon the act done, and derive no credit from it, but depend for their effect on the credit of the party who makes them, they are not admissible, merely because they have some connection with the act or relate to it. Roscoe Cr. Ev. 24, 190, 302; 14 N. H. 101; 11 Ga. 615; 5 Md. 450; 36 Miss. 190; Greenleaf, Vol. I, 100, 101, *et seq.* See also State vs. Duncan, 8 R. 562; 16 An. 377

To make declarations a part of the *res gestæ*, they must be contemporaneous with the main fact, not, however, precisely concurrent in point of time. If they spring out of the same transaction, elucidate, are voluntary and spontaneous, and made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous. 5 Md. 450.

Applying those rules to the present instance, it does appear that the facts sought to be proved form part of the *res gestæ*, and that the accused should have been permitted to offer the testimony offered in support, to show his motive.

The second bill refers to the refusal of the Judge to receive the evidence of two jurors, to impeach the verdict of the jury. The ruling was a proper one and cannot be questioned.

The other complaints are to the refusal of the Judge to grant a new trial, on the ground of newly discovered evidence, to the illegality of the term at which the prisoner was tried, and to the illegality of the *fine* imposed.

The view taken of this case renders unnecessary the decision of those questions, which may never arise herein.

It is, therefore, ordered and decreed that the verdict of the jury herein be annulled and quashed, and that the judgment and sentence based thereon be avoided and reversed, and it is further ordered and decreed that this case be remanded to the lower court for a new trial, with instructions to receive the rejected testimony and to proceed therein further according to law.

No. 109.

SUCCESSION OF L. BODENHEIMER.

An order refusing the removal of a cause from a State to a Federal Court, is an interlocutory decree, which cannot work irreparable injury and is, therefore, not appealable.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

Alexander & Blanchard for Plaintiffs and Appellees.

Land & Land for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. This appeal is taken by S. Levy, Jr., liquidator of the commercial partnership of Levy & Bodenheimer, from a decree of the District Court refusing his application for the removal of the cause to the Circuit Court of the United States, Western District of Louisiana.

The motion to dismiss is based on the ground, that the judgment appealed from is an interlocutory decree, which cannot work irreparable injury to appellant, and is therefore not appealable. The motion is well taken and must prevail.

The judgment complained of is not a final disposition of the cause, but its effect is merely to retain the case in the court in which it was presented. If the Judge erred in his ruling, his error can be corrected on appeal from the final judgment which he will render in the premises, and the injury is, therefore, not irreparable.

As the law abhors a multiplicity of suits, so will courts discountenance unnecessarily numerous appeals, when the evil complained of can be remedied in a single appeal.

Few points of practice are more clearly and more firmly settled in our jurisprudence than that which denies the right of appeal from an order of court refusing an application for removal of a cause to a Federal Court. Ralph vs. Claiborne, 2 M. 176; Higgins vs. McMicken, 6 N. S. 712; Baron vs. Kingsland, 5 La. 378; New Orleans vs. Shepherd, 9 An. 241; Chapman vs. Judge, 15 An. 336.

A wide distinction exists, and must be made, between an order refusing the removal and a decree which grants such an application.

In the former case it does not finally dispose of the suit, and in the latter it operates a final disposition of the cause *quoad* the court in which it had been instituted.

In the latter case an appeal lies, and has been frequently entertained in similar circumstances. Rosenfield vs. Express Company, 21 An. 233.

The appeal herein taken is, therefore, dismissed at appellants' costs.

No. 110.

SUCCESSION OF L. BODENHEIMER.

ON OPPOSITION TO FINAL ACCOUNT.

An executor residing out of the State, and who, coming here, represents himself as a resident and is recognized by the court as executor and as entitled to act as such, cannot claim that he was recognized as a domiciled executor and is exempt from bond, where he does not clearly establish that at the time he had changed his domicile.

Non-resident executors are not requested to take an oath, having already been sworn. The taking of an oath as executor here is a superfluity, and does not qualify them. The giving of the bond alone does.

Where there are two executors, and one qualifies and the other does not, the entire commission accrues to the one who has qualified. 25 An. 320, affirmed.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

Land & Land for the Executor, Appellant.

Alexander & Blanchard for Opponent and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The residuary legatee of the deceased opposes the account presented in this succession, in so far as it allows to S. Levy, Jr., as executor, the sum of $1,541.83, as his commission at 2½ per cent. on the amount of the inventory.

The opponent claims that the pretensions of Levy cannot extend to more than one-half of that commission, for the reason that his co-executor, Filer, having *qualified* as such, became entitled to the second half, but having subsequently been removed, forfeited his right thereto, the forfeiture enuring to the benefit, not of the co-executor who had qualified, but of the succession.

The item had also been opposed by Filer, who claimed half of it.

The District Court held that Filer was not entitled to that half, that Levy had no right to it and consequently that it accrued to the succession.

The facts are: that L. Bodenheimer, who was domiciled in Shreveport, died in New York, leaving a will made there, whereby he appoints as his executors, Levy, his partner, who was domiciled in Shreveport, and Filer, his nephew, who was domiciled in New York.

Filer came to Shreveport and there presented a petition to the District Court, representing himself as a *resident* of Caddo Parish, and, after proper allegations, touching the death and domicile of L. Bodenheimer, the property belonging to him, the will probated in New York, his appointment as executor, and after submission, as part of his petition, of all the proceedings had in New York on the subject, he prayed

for the registry and execution of the will and for his recognition as executor thereof.

The court made an order, part of which is to the effect that Filer be recognized as executor and entitled to act as such.

Filer then took an oath for the discharge of the duties imposed on executors.

On discovery of those proceedings, Levy, the co-executor, charged that the order had been produced by fraudulent representations, that Filer was a non-resident, and that the order should be annulled, and that if not rescinded, Filer should be required to give bond.

Filer answered by a general denial, specially averring that at the date of his petition he was a *bona fide resident* of Caddo Parish, and that he was duly *qualified* as executor.

After hearing considerable testimony on the question of residence, and other evidence, the District Judge reached the conclusion that, at the date of the petition, Filer had not ceased to have his domicile in New York, that the order should not however be annulled, but required Filer to furnish bond as a non-resident executor, within thirty (30) days. This judgment was never appealed from and must be taken as correctly rendered. Filer failed to furnish the bond.

It is admitted in opponent's brief that "hence, at the end of the delay given him, April 10th, 1883, he ceased to be executor."

There can be no doubt that the order which recognized him as executor, and entitled him to act as such, was proper and valid, even on the face of the petition, in which he declared himself to be a *resident* of Shreveport. That petition was accompanied by proceedings from which it appears that he was domiciled in New York. The fact of a *residence* does not imply that of a *domicile*. 34 An. 911.

Therefore, when the District Judge made the order, he recognized Filer as a *non-resident* executor and authorized him to act as such, but only on complying with legal exigencies.

What were those legal exigencies?

In such cases the law does not require that a non-resident executor should take an oath, because already sworn. 1 R. 263, Succession of Wedderburg; also, 12 An. 329. It merely subjects him to the giving of a bond. 7 An. 742; 12 An. 399.

Hence, the oath which Filer took was a superfluity, and did not qualify him. The giving of the bond was what would have qualified him. In that essential compliance he failed.

The judgment of the Court in the suit of Levy, to annul the order of appointment, or require a bond of Filer, is merely explanatory of the order, and is one and the same with it.

It therefore follows, that Filer never qualified as executor and that he never was entitled to a commission.

The remaining question is, simply, whether the half of the commission to which Filer would have been entitled (over and above the legacy made to him by the testator, with mention that it was to be *in super*) accrues to the co-executor, Levy, or to the succession.

The question admits of no doubt. It is correctly settled by the ruling in Hall vs. Salter, 25 An. 320, in which the Court distinctly held, that when there are two executors to a will, and one qualifies, while the other does not, the latter is presumed to have renounced the trust, and the former is entitled to the entire commissions.

In the Succession of Edwards, 34 An. 222, this Court held, that as one of the executors was a legatee, without express title to the commission, over and above, the other executor was not entitled to more than half of the commission. The reason for that conclusion is obvious: that the executor, who was a legatee, was considered as paid by the bequest, in the absence of option on his part between the same and the commission, before qualifying. Where, then, a co-executor has been paid his commission, how could his co-official claim title to a full commission of 2½ per cent. on the amount of the inventory? We fail to perceive.

It is, therefore, ordered and decreed that the judgment of the lower court be avoided and reversed, and it is now ordered and decreed that the opposition of Isaac Bodenheimer to the whole commission of S. Levy, Jr., as executor of the will of the deceased, as stated in the account, $1,541.83, be rejected, and that said Levy be recognized as entitled to the whole of said commission, opponent to pay costs in both Courts.

No. 125.

W. A. Martin vs. Lizzie Dickson.

The subrogee to a lessor's rights is entitled to claim, with provisional seizure, whatever rent was due at the date of the transfer.

A stipulation in a lease to pay part of the rent to a person named, does not divest the landlord of a right to the amount, where the stipulation *pour autrui* was not accepted previous to the transfer. The subrogee is entitled to claim such amount in the right of his subrogor.

The burden of proof is on him who alleges payment. The plea admits the debt.

Damages cannot be allowed to a seized tenant, where the rent claimed was due at the date of seizure.

APPEAL from the Second District Court, Parish of Bossier. *Drew*, J.

J. D. & J. T. Watkins and *Lowery & Vance* for Plaintiff and Appellee.

J. H. Shepherd for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff sues in the rights of the lessor of the defendant to recover $2,000 for rent due at the date of the transfer and suit. The claim was accompanied with a prayer for a provisional seizure, which was allowed. Under the writ, property was seized, valued at nearly the amount sued for.

The defendant filed various exceptions and answers, pleading the extinguishment of any indebtedness under the lease prior to the suit. She averred damages to the extent of $2,000, sustained in consequence of the wrongful seizure of her property and, reconvening, prayed for judgment in her favor for that sum.

From a judgment against her for $634.40, with privilege on the effects seized, the defendant prosecutes this appeal. The plaintiff has answered the appeal praying for an increase of the judgment to two thousand dollars, the amount sued for.

It appears that, on the 31st of December, 1880, in consideration of the payment of taxes due on certain property in the Parish of Caddo, and leased by Mrs. H. P. Dickson to her daughter, the defendant, on stated terms and conditions, the former transferred to the plaintiff, Martin, her interest in the lease.

The property consisted of two places, described as belonging to the Dickson estate. It had been leased, in December, 1879, for the years 1880, '81, '82, '83, and '84, at the price of $4,000, payable annually on November 1st, 1880, and every year thereafter, in the manner and to the persons following: $800 to Mrs. McDowell; $600 to L. M. Nutt; $2,000 to W. R. Barstow; $500 to Mrs. Dickson, preferred to all, and the balance for taxes, $100. The lessee was besides to pay all the taxes to become due on said property. The act of lease was signed only by the lessor, the lessee, and Mrs. McDowell. Whether Barstow declined, as stated, or not, to put his name to it, or otherwise to accept the stipulation in his favor, is not made to appear. Neither is it shown that L. M. Nutt, another beneficiary, made himself an obligee.

The plaintiff claims the $2,000 stipulated in favor of Barstow, and which, in the absence of acceptation by him, were due Mrs. Dickson.

Lizzie Dickson, the lessee, was not notified of the transfer; but, on the 4th of January, 1881, under the averment that the $2,000 were due, Martin, the transferree, brought suit, seizing provisionally the effects on the premises leased.

It is then that Lizzie Dickson was formally and unequivocally notified of the transfer and substitution.

It is important to state that, on the very day of the transfer, Martin, in furtherance of the obligation which formed the consideration of the lease, namely: the 31st of December, 1880, which was the last day on which, under the constitutional clemency and immunity, the taxes could be paid without interest and charges prior to the 1st of January, 1881, paid to the sheriff of Caddo Parish $1,457.11, so that what rights were intended to be acquired by him, if any, thereupon vested in him absolutely.

In her answer the defendant had declared, without specification, that she had paid taxes to the amount of $1,195,13, but on the trial she offered a supplemental answer specifying what items she had paid to the credit of her lessor, and by her direction, previous to the transfer, aggregating $2,279, and she endeavored to prove the verity of her averments. The plea of payment admitted that the debt once existed, and threw on the defendant proof of its extinction in that mode. In the absence of such evidence the plaintiff would have been entitled to recover.

She was heard to establish the same, but appears to have failed to do so throughout. The taxes which she has paid were not satisfied at the date which the receipts bear, December 30th, 1880, but long after, namely: in September, 1881. This fact was shown by entries in the books of the sheriff and tax collector. Neither was the Fort judgment or claim, which, if it had any existence and was satisfied, shown to have been likewise paid subsequent to the date of the transfer of the lease, by Mrs. Dickson to Martin, the plaintiff.

The evidence may be deemed also deficient in several other respects, which it is not necessary to specify.

The District Judge, however, considered a number of items as established, and after deducting therefrom the $2,000 claimed, rendered judgment for the difference, $634.40.

A review of the evidence does not enable us to say that he erred in his conclusions.

As to the reconventional demand, it suffices to say that, as the plaintiff recovers rent which was due at the date of the suit, the writ did not wrongfully issue. The demand for damages must, therefore, fail.

Judgment affirmed with costs.

No. 112.

KAHN & BIGART VS. J. SIPPILI.

In proceedings *in rem*, as in ordinary cases, the jurisdiction of the appellate court must be tested by the amount in dispute, as shown by the amount claimed in the pleadings, and not by the value of the property attached, or by the amount of the judgment which is, or may be, subsequently rendered in the case.

In such cases the court, before which the proceedings are instituted and under whose process property in its territorial jurisdiction may, on proper showing, attach other property of the absentee situated in the State, and in parishes not within the jurisdiction of the court.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

Alexander & Blanchard for Plaintiffs and Appellants.

D. T. Land, Curator *ad hoc*, for Defendant and Appellee.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs, claiming to be creditors of the defendant, an absentee residing in the State of New York, in the sum of $3,085.22, brought suit against him by attachment of his property, alleged to be in the Parishes of Caddo, Ouachita, and West Feliciana, and obtained garnishment process against parties residing in said parishes respectively.

After the garnishee in Caddo Parish had answered that he was indebted to the absentee in a sum of $151.43, and before answer had been made by the other garnishees, the curator *ad hoc*, appointed to represent the non-resident, filed a motion to dissolve the two attachments, directed to the sheriffs of Ouachita and West Feliciana, and this appeal is taken from a judgment sustaining that motion.

Appellee now moves that the appeal be dismissed, on the ground that we have no jurisdiction "*ratione materiæ*." He argues, that the proceeding being *in rem*, the judgment to be rendered in the cause cannot exceed in amount the value of the property seized, and that, because the amount of the property seized is only $151.43, the amount in dispute does not exceed one thousand dollars.

It is now settled beyond a doubt, that the test of our jurisdiction is to be found in the amount in dispute, as shown by the amount claimed in the pleadings. When that amount exceeds $1,000 our jurisdiction vests, and cannot be affected by the incidents or accidents of the trial, and the result of the controversy in the lower court. This consideration disposes of appellee's argument, that because a third party has

intervened in the suit for the purpose of claiming the ownership of the property attached, our jurisdiction is to be tested by the fund to be distributed. At the present juncture we are not concerned with the rights, either in law or in practice, of the intervenor, as our investigation is restricted to an issue between plaintiffs and defendant. The motion to dismiss is, therefore, overruled.

ON THE MERITS.

The ground of the motion to dissolve the writs of attachment to be executed in the Parishes of Ouachita and West Feliciana is, in substance, that the proceeding being *in rem*, the court having no jurisdiction over the defendant *in personam*, it was without jurisdiction to pursue his property situated beyond its territorial jurisdiction, and could issue no garnishment process against a resident of another parish, unless the defendant had been personally cited, or had appeared by answer in the suit.

The argument is that, in this case, the writ is not a conservatory remedy incident to the main action, but, being issued in lieu of citation on the defendant, it becomes the very foundation of the action, and cannot, therefore, be issued by the court beyond its territorial jurisdiction.

The main support of the argument is derived from the decision in the case of Favrot vs. Delle Piano, 4 An. 584, in which the principle contended for is substantially announced. But a careful inspection of the case discloses the fact, that the decision rested on another and a different point, and that the point passed upon in the ruling or dictum invoked by appellee was not necessary to a decision of the cause under consideration.

Hence, we conclude, that the dictum is not binding or decisive in jurisprudence.

A careful review of our reports shows that the precise issue presented in this motion has not yet been directly determined by our Court, and we shall, therefore, treat the matter as "*res nova*."

Many of appellee's propositions, touching the natural scope and effect of the action *in rem*, by the attachment of the non-resident's property found in the State, are undeniable and correct.

For instance, it is true, that in such a proceeding the Court does not, by its process alone, acquire jurisdiction over the defendant *in personam*, and that it can render no binding or effective judgment against him over and above the amount or value of the property attached, and that the judgment has no vitality except against the property subjected to its control. But, on the other hand, it is equally true, that

the creditor has the undoubted legal right to reach all the property of his debtor which can be found in the State, and that he has the choice of the forum in which he desires to initiate his proceedings. Now, if his debtor, as in this case, has not in the parish selected property sufficient in amount or in value to satisfy his claim, he is not restricted, by law, to the seizure or attachment of that property, and his right to reach other property situated in another parish cannot be impaired. But, under our Code, he is not permitted to bring the same cause before two separate courts. C. P. 94.

If he attempts it, he is met by a plea of *lis pendens* in the courts where subsequent proceedings are instituted, and is thus subjected to the penalty of costs, and to the loss of his recourse on the property.

On the other hand, it is undeniable that the court where the proceedings were instituted, and which issued the first process, does acquire some jurisdiction over the cause, and at once obtains control of the property attached within its territorial jurisdiction, and to the end of deciding whether such property can legally be applied to the satisfaction of plaintiffs' claim, it must, of necessity, adjudicate on the sum, and ascertain the amount or extent of the defendant's indebtedness.

Having such jurisdiction, it necessarily has the power, on proper showing of the insufficiency of the property thus attached, and of the existence of other property of the absentee in the State, to extend its process to the same, and to thus subject it to its control.

We know of no legislation which denies such a natural and legitimate power, or authority which militates against its exercise, and we have been referred to none.

We find its exercise necessary to prevent a denial of justice to both parties, and we hold it to be an inherent power of the court which is legally vested with jurisdiction of the cause.

We are constrained to differ with our learned brother of the District Court in his conclusions on this point, and we conclude that he erred in his judgment sustaining the motion to dissolve.

It is, therefore, ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided and reversed, and that the motion of the curator *ad hoc* for the dissolution of the writs of attachment issued herein, and directed to the sheriffs of the Parishes of Ouachita and West Feliciana, be dismissed at the costs of defendant in both Courts.

No. 129.

THE STATE OF LOUISIANA VS. ROBERT FERGUSON.

It is not necessary, to support a prosecution for forgery or falsely uttering, that the instrument purporting to be forged should be perfect in its resemblance to the kind it was designed to represent. It is sufficient that it was calculated to deceive.

Thus an order addressed to a merchant in these words: "Please let George have sixteen dollars worth, and charge the same to Mr. George Garrett;" held sufficient.

APPEAL from the Third District Court, Parish of Claiborne. *Graham* J.

A. Barksdale, District Attorney, for the State, Appellee.

E. H. McClendon and *J. S. Young* for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant was indicted for forging an order, and for uttering the same, in two counts; was convicted on the last count and sentenced to two years imprisonment at hard labor and has appealed.

The order was as follows:

"HOMER, LA., March 17, 1883.

"Mr. G. G. Gill: Dear Sir—Please let George have sixteen dollars worth and charge the same to Mr. George Garrett."

There was a motion to quash the indictment upon the ground, substantially, that the said order was void on its face and could not therefore serve as the foundation of a prosecution for forgery.

This motion was overruled, and this ruling is charged as error, and relied on solely for a reversal of the sentence.

The law on the subject is this: It is not necessary that the instrument, whether a promissory note, bill of exchange, order, or other instrument should be perfect; it is sufficient if it bear such a resemblance to the document it is intended to represent as is calculated to deceive. Roscoe Criminal Evidence, 7th Ed. 545; 1 Bishop, 3d Ed. Sections 748, 749.

In this instance the order may be informal in not having the signature of George Garrett at the foot of the instrument and having "Mr." before his name. Notwithstanding such informality, however, there is no question but that, if the instrument were genuine, that is, written by George Garrett, the reputed drawer, in his own handwriting, and the money or goods delivered, he could have been made liable for them. It is not sacramental that the drawer should place his signature at the foot of the instrument or below the body of it, as ordinarily

done, to bind him, and the prefix of "Mr." could in no way affect the question of his liability.

Under this view of the case the instrument was legally sufficient, as a basis for the prosecution, and the motion to quash properly overruled.

Judgment affirmed.

No. 115.

The State of Louisiana vs. Laura Hamilton.

The excusing of a tales juror by the Judge, although not legally exempt, and although the accused may have at the time exhausted his peremptory challenges, is not sufficient to vitiate the verdict.

An accomplice may be called as a witness for the State, even when jointly indicted with said accused and before his own conviction or acquittal, where the trials are separate.

The Judge is not bound to give a charge, although it may be correct as an abstract principle of law, where, in his belief, there is no fact proved to which it is pertinent.

APPEAL from the First District Court, Parish of Caddo. *Jones*, J.

M. S. Crain, District Attorney, for the State, Appellee.

E. H. Randolph for Defendant and Appellant.

The opinion of the Court was delivered by

Todd, J. The defendant appeals from a sentence of five years' imprisonment in the penitentiary for burglary and larceny.

We find in the transcript three bills of exceptions taken against the rulings of the Judge *a quo* during the progress of the trial:

1. The first bill was taken to the action of the Judge in excusing from jury duty a person employed as pilot on a United Stated Government vessel and summoned as a tales juror, excused after the accused had exhausted her peremptory challenges, and the juror, as claimed, not being legally exempt from jury duty. The Judge stated in the bill, that he excused him because he was a pilot employed by the U. S. Government on a boat that might be ordered to move at any moment.

There is a certain discretion vested in District Judges, in regard to excusing jurors from service, which has been frequently recognized by this Court, and the exercise of which affords no reasonable or legal ground of complaint. State vs. Sonnier, 33 An. 237; State vs. Welch, 34 An. 991.

Had this juror not been excused, and been erroneously excluded

subsequently from the jury, on the challenge of the State to his competency, this Court has held, on unquestioned authority, that such exclusion would not even be sufficient to set aside the verdict. The main object of the law is to secure for the accused a fair and impartial trial by an unprejudiced and competent jury, and when this has been attained, and we hear no charge to the contrary as to this jury as finally composed, then the end of the law is subserved, and the accused cannot be held as aggrieved, even should he have failed to secure on the jury some particular person whom he either wanted or pretended to want to serve thereon. State vs. Barnes, 34 An. 395.

2. The second bill was taken to the ruling of the Judge, in admitting one Hattie Martin to testify for the State. This witness had been jointly indicted with the defendant, but a severance had been granted and the defendant had been first placed upon trial. It was objected, that until this witness had been acquitted or convicted, she was not a competent witness. The authorities on this point are not uniform. Bishop lays down the rule thus:

"One of two or more joint defendants cannot be a witness for, or against another, even on a separate trial, until the case as to himself is disposed of by a plea of guilty, or a verdict of conviction or acquittal; then, he may be. Sentence need not be rendered. Of course, if the indictments are separate he may be a witness, though the offense is supposed to be joint. And in some of the States the statutes are interpreted to make him such where the indictment is joint, the trials being separate. There are even, perhaps, States in which this is held under the common law." Bishop, Crim. Proc., 3d Ed., Sec. 1020. And in a note on the same page it is added that this would seem to be the late English doctrine, referring to Reg vs. Winsor, 10 Cox C. C. 276, 327; Law Rep. 1 Q. B. 390; 11 Cox C. C. 607. Many cases are referred to also from the American reports, as sustaining the same doctrine. It is unnecessary to cite them, as the same doctrine has been expressly sanctioned by this Court in the case of the State vs. Prudhomme, 25 An. 522; which has been approvingly cited in the case of the State vs. Russell, 33 An. 136. Whatever may be our opinions, were the question a new one, these authorities must be held as conclusive.

3. The third bill was taken to the refusal of the Judge to charge, "that if the prisoner was under fourteen years old, she was *prima facie* incapable of committing crime." Among the reasons assigned for his refusal the Judge says, that "there was no evidence that the girl was under the age of fourteen years."

We must respect this reason and hold it sufficient to justify the Judge's refusal. Under his statement such a charge would have been

foreign to the issues in the case, and without a bearing on the facts proved on the trial. We have often held that the Judge was not bound to charge abstract principles of law having no immediate relation to the case before him, and that the question of its pertinency was a matter largely, if not exclusively, within his discretion. State vs. Riculfi, 35 An., and authorities therein cited.

4. There is, also, an assignment of errors, to the effect that the record does not disclose that the grand jury, which had found the bill, had been sworn. This question is disposed of adversely to the accused in the case of the State vs. Stewart, just decided, in which the facts are the same as presented in this.

This completes the review of the record, and there is nothing therein to justify us in disturbing the sentence appealed from; and the same is, therefore, affirmed with costs.

No. 123.

VICKSBURG, SHREVEPORT & PACIFIC RAILROAD COMPANY vs. HENRY T. DILLARD. And THE SAME vs. J. M. FOSTER ET ALS.

In suits for the expropriation of lands for railroad purposes, the owners are entitled to the value of the lands expropriated, and also to damages, in addition to those sustained by the taking of the land.

Under our present Constitution private property can neither be taken nor damaged for public purposes without adequate compensation.

In estimating this adequate compensation, the location of the road bed near buildings, or so as to divide a cleared field, or the fact that it disturbs or destroys the system of drainage, and like circumstances, should be taken into account.

Since the damages in such cases are continuous and will last while the railroad remains, all the damages, present and prospective, which the land owner will suffer, should be assessed.

APPEAL from the Second District Court, Parish of Bossier. *Drew*, J.

Wise & Herndon for Plaintiff and Appellant.

J. A. Snider and *Alexander & Blanchard* for Defendants and Appellees.

The opinion of the Court was delivered by

MANNING, J. These cases were cumulated by consent. They present the same questions, and are proceedings by the Railroad Company to expropriate lands of the defendants alleged to be necessary for the road bed of the railway. The controversy is only over the value of the expropriated land, and the damage arising therefrom.

The jury found in separate verdicts $2,400 as the value of Dillard's

expropriated land, and $2,800 as damages to his plantation; and $2,521 as the value of the land expropriated from Foster and his co-defendants, and $2,500 as their damages. They found for the plaintiff on the right of way, according it. The plaintiff appealed.

Both the plantations are in Bossier Parish and close to Shreveport, Dillard's being the nearer. The road bed runs through the middle of the Dillard place. The Foster land is divided in two by a shed road, and the railway bed runs through the middle of that part of the plantation which is south of that road. This shed road is a covered way, built under authorization of the parochial authorities for facility of travel and transportation of freight.

The lands appear to be very valuable. The lowest estimate is far ahead of similar lands in other parts of the State, where the stimulus of returning prosperity is less felt than there. Several witnesses place the value at $65 per acre, others at $75, and one at $100. Many say that its marketable value cannot be stated, by which they mean that it cannot be bought—it is not on the market. Unlike lands generally, the woodland is as valuable as the cleared land because of its proximity to Shreveport, which affords a market for fuel, and the shed road enables its transportation at all seasons.

There is a ridge running through the highest and best land. The railway selected this as a favored spot, admirably adapted for its purposes. It was the best and most convenient location for its bed, but it is the most inconvenient and hurtful to the plantations. Each plantation is thus severed—cut in twain—so that communication between the two parts is impeded. Instead of passage to and from one part to the other being unhampered, the laborers and teams can cross and recross only at certain places more or less far apart. This inconvenience will be realized more vividly by recalling the difficulty one has to reach a spot on the opposite side of a bayou. You must travel on the side you are on till you reach a bridge, and crossing, go back to opposite where you started. Not unfrequently ten miles must be travelled to reach a spot not twenty yards distant from your starting point. It is not surprising that the intelligent and thoughtful planters, some of whom were witnesses and others were jurors on the trial below, gave great prominence to this difficulty of inter-communication, caused by the railway bed. And it is worthy of remembrance that the Code has formulated a rule for guidance in regulating a passage from an estate enclosed by surrounding lands, which may well be applied to the analogous demand of a right of way by a railroad, viz., that it shall be fixed in the place least injurious to the person on whose estate the passage is granted. Rev. Civ. Code, Art. 700 (696).

There is another consideration tending in the same direction. Each one of these plantations is in the highest condition of improvement and cultivation. Each was planned, laid out, arranged, and disposed as a symmetrical whole. The cabins, stables, ginhouses, barns, etc., have been placed with reference to the needs of the entire plantation, and to promote convenience and the better conduct of the place, and its most profitable cultivation. More important still, a system of drainage had been devised, adapted to the structure (so to speak) of the land, the maintenance of which in its integrity is the most imperatively essential condition for successful cultivation of our soil. Any considerable obstruction of this system of drainage, or serious interference with its full action, is not inconvenience but ruin. These plantations, each arranged on a harmonious plan, were in complete order when the railway bed pierced them in the middle. It runs straight through the open land separating the ginhouses from the fields, and isolating cabins from tracts intended to be cultivated by their inmates.

And there it will remain. It is not a temporary obstruction which may next year be removed, but a permanent and abiding hindrance to the cultivation of the places. Instead of free access to all parts of the plantation, crossing can be done only at fixed and widely separated spots. Time is consumed by traversing circuitous routes, and danger incurred from passing trains. In some places the road cuts through the bends in the bayous detaching small parcels of land, and putting them practically out of cultivation. The drainage is impeded. The excavations made to obtain earth for the embankment are not continuous. Patches of ground lie between, and they cannot therefore serve as a ditch.

It is argued that the enhancement in value of the defendants' property because of the railroad is a legitimate offset of the damages suffered by building it. The proof here is that the road cannot benefit these plantations, and so far as transportation of their produce is concerned, they have no use for it. This covered road, of which mention has been made, is more convenient to them and less expensive. They must load their wagons to get their produce either to the railroad or the shed road, and having had that trouble and labor, it will be more convenient to continue on the shed road, and there being no depots between these places and Shreveport no advantage is to be had by hauling to the railroad.

The Constitution enlarges and emphasises the prohibition against taking private property for public use by specially including "damaging" within the prohibition, Art. 156, and as this is an addition to the usual phraseology, it is said to denote the increased care and circum-

spection with which the organic law hedges this matter. However this may be, it is certain that few subjects are within the cognisance of either legislative or judicial bodies of more importance than maintaining the safeguards that were in the very beginning of our government thrown around private property, and repairing the breaches that have been made in them by an unwise yielding to the clamor of those who disguised covetous desires of acquisition under the pretext of concern for public uses. By these means the elements of damage for taking private property have often been confined within such narrow limits as to convert the constitutional protection into a false pretence, and practically make it only a "promise to the ear" which it "breaks to the hope."

The authority of Mills, in his work on Eminent Domain, is cited in the plaintiff's brief to shew that annoyances from various mentioned causes, incident to the running of railroad trains, are not actionable; and that compensation is not to be given by a court of justice for a great variety of consequential damages resulting from the construction and operation of railroads. But when one comes to probe the matter, and inquire why such restrictions have been imposed, no reason can be assigned, except that the dicta of courts, made in the infancy of railroad law, countenanced them, and text writers have adopted them without question.

Why should not the fact that the track of a railroad runs through the heart of a plantation, and severs its arteries, and dislocates its whole framework, be an element of damage? Is not the injury greater if the train shoots between barn and stable, or close by ginhouse or sugar mill, than if it skirted the edges of fields, or was far removed from the inhabited enclosures?

We are asked to disregard the verdict of the jury, and are reminded of the wisdom of that provision in the Constitution of this Court, which gives us supervision over verdicts. The statute concerning expropriation has confided the assessment of damages to a jury selected from a special class. None but freeholders can sit upon it, but we would not abrogate our function because of that peculiarity. It is apparent from the record that these verdicts are not guess-work. Some of the witnesses, when asked how they computed the damages in these cases answered, by ascertaining the annual damage to each plantation, and then giving to the owners such sum as, put at interest at the usual rate, would yield that sum. As the damage is continuous, the reparation of it should be prospective as well as for the present. 1 Redfield on Railways, §§ 71, 74. Others adopted another mode, *i. e.*, ascertaining the difference between the value of the plantations before the

railroad bed was laid and now, and by some of them the difference was stated at from five to ten thousand dollars less now than before.

The jury have adopted a mean avoiding the extreme estimates—in other words have taken the testimony as a whole, and based their verdicts upon it. And we do not think they have erred.

Judgments affirmed.

No. 120.

THE STATE OF LOUISIANA VS. SILAS DILLARD.

A Judge has a right to change the terms of the court over which he presides. He was not deprived of such authority by the Act No. 7 of 1880, which only directed how the orders fixing the terms should be made and published.

Where a term of court has been ordered to be held by the Judge under a general order fixing the terms, and subsequently he prepares another order, in which it is announced that it will not be held, and hands such order to the clerk with instructions not to record it, the Judge can, within a short time after, and before any action is taken under it, withdraw or erase the order, and the first order for the holding of the term will be in full force, and the term held under it, a legal one.

Where a change is made in the terms it is not necessary that a notice of such change should precede the order making it, but that notice for the prescribed time should be published before the arrival or holding of the term.

Where, owing to some obstacle, the grand jury cannot be empanelled on the first day of the term, it may be empanelled on the second day.

APPEAL from the Tenth District Court, for the Parish of DeSoto. *Logan*, J.

W. P. Hall, District Attorney, for the State, Appellee.

E. W. Sutherlin and *J. C. Pugh* for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. This is an appeal from a sentence of imprisonment of two years at hard labor for an assault with intent to commit a rape.

There was a motion on the first day of the term to quash the venire, and, subsequently, during the term, after the finding of that indictment, a motion to quash the same.

The grounds of both motions are substantially the same, with one exception. Both motions were overruled, and the alleged errors of the Judge in these rulings are the main reliance to reverse the sentence appealed from.

1. It is charged that the term of court at which these proceedings

took place was an illegal one, because held under or by virtue of an order of the Judge, (of the 23d of May, 1883) changing the terms of the court for the Parish of DeSoto, and that the Judge was without power or authority, under the Constitution and laws, to change the terms of court when once fixed.

The third clause of Article 117 of the State Constitution provides as follows:

"Until provided by law, the terms of the District Court in each parish shall be fixed by a rule of said court, which shall not be changed without notice by publication at least thirty days prior to such change."

This clearly conferred on the Judge the power to fix the terms of court and, under the condition stated subsequently, to change them.

The Article likewise gave to the legislature the right to assume at its pleasure the power thus delegated to the Judges, and divest them of it entirely and fix and establish the terms of court by statutory enactment, or, in its discretion, continue wholly or partially the exercise of the power in the Judges originally delegated by the Constitution.

There was legislation on the subject at the first session of the General Assembly after the adoption of the Constitution, known as Act 7 of 1880. That Act fixed the first terms of all the courts and left with the Judges the authority to fix the subsequent terms, which they possessed under the above Article of the Constitution, providing simply the mode by which the same should be fixed, and that the jury and non-jury terms should alternate. As we view it, all the powers of the Judges derived from the Constitution, except as expressly restricted by the Act, were left unimpaired.

Hence, it necessarily follows that the Judges did, after the passage of this Act, and do possess the power to change their terms, as delegated by the Constitution, subject only to the regulations contained in the Act.

We find, too, from an examination of the record, the prescribed regulations were strictly followed with respect to the order of the Judge (of May 23d, 1883), under which the term of court was held, at which this prosecution was instituted.

It was made in open court, duly entered on the minutes, was published for the required time and conformed to the Act, with respect to the alternate jury and non-jury terms of the court.

Neither the Constitution nor the law cited required that the order should have been preceded by the notice or publication. It was sufficient that this notice for the prescribed time should precede the first term held under it. This is the obvious meaning of the Act, and at the same

time the legislative construction of the Article of the Constitution in question.

2. It is, however, urged in the motions under consideration that, granting this order of the 23d of May was a legal one, so far as it authorized the holding of the term of court in question—August term, 1883—it was revoked and rescinded, and, therefore, that term was held without any legal authority whatever, and the proceedings before it were void.

The facts bearing on this point, which we gather from a careful reading of the record, are substantially these:

On the 27th of July, 1883, the Judge prepared an order for the holding a special term of the court in DeSoto on the first Monday of September following. In this order appeared these words: "And that the drawing of jurors for court, fixed on the 2d Monday of August, 1883, be, and is hereby set aside and annulled, as said court will not be held." The paper containing the order, written by the Judge, was handed by him to the clerk of the court, who was instructed not to record it; and, according to the Judge's statement, neither to record nor file it. The clerk was thus instructed, as explained by the testimony of the Judge, because some doubt had crossed his mind about the legality of the August term at the time of writing the order; that in about one hour's time, this doubt having been removed, he returned to the clerk's office and erased the above lines of the order, leaving the writing otherwise intact, which ordered the holding of the special term of court for September, and directed the summoning of the venire for that term. The Judge further explains his motive for embodying the lines referred to in his order, by stating that, if no August term was held, the venire already drawn for that term could serve for the special September term, and the jury commissioners, by the terms of the order, would be so instructed.

It is charged that this part of the order, *i. e.*, the lines above quoted, had the legal effect of dispensing with the August term of court, and that it was beyond recall, and that no subsequent act of the Judge, after writing it and handing to the clerk, could destroy the effect of it, and the act of the Judge in making the erasure has been severely and acrimoniously criticised and commented on in the argument of the case before this Court.

We see no just grounds for such criticism. It might have been more conformable to the deliberation, system and order that should characterize all judicial acts, if the Judge had solved his doubts and reached a fixed conclusion touching the legality of the term of court referred to, before taking the steps he did; but when he was satisfied of his error,

it was not only his right, but his duty, to correct it. The whole matter, under the circumstances stated, was in his hands and clearly within the scope of his authority as the presiding Judge of that court. Under the facts disclosed, he never made an effective order, dispensing with the term of court, and even had he issued such an order it was clearly within his power to withdraw it when and in the manner he did.

Apart from his authority, his act in the premises could not be held as calculated in any way to injure or wrong anyone.

3. In the motion to quash the indictment it is urged that the grand jury was without authority to find the bill, because it was empanelled on Tuesday, the second day of the term. The first day was entirely consumed by the proceedings, which were to determine whether the jury could be empanelled at all, or not. It has been held that the law providing for the organization of the grand jury on the first day of the term is directory, and when any obstacle prevents their being empanelled on that day, it can be done on the next. State vs. Davis, 14 An. 678.

4. We find in the record a bill of exceptions taken to certain questions asked a number of jurors on their *voir dire*, with a view to test their competency. The questions were answered, and the jurors accepted. The questions may have been unnecessary, but we cannot see how either the questions or the answers were calculated, in the least, to prejudice the accused. They were without significance, and it is needless to discuss them.

This completes the review of all matters presented in the record for our consideration, and they afford no just ground of relief to the accused. The sentence and judgment are, therefore, affirmed with costs.

No. 126.

O. F. Mulhaupt vs. Peter Youree.

The burden is on the vendor, in a sale with the pact of redemption, to prove that the contract was one of mortgage or of *antichresis*, when possession was given to the purchaser.

Written evidence alone is admissible between the parties, when fraud or error is not alleged.

Interrogatories may be propounded to the vendee, but his answers, uncontradicted by written evidence, showing the reality of the transaction, will conclude the vendor.

If not exercised within the delay agreed, and according to the terms of the contract, the right of redemption will be considered as forfeited.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

J. H. Shepherd for Plaintiff and Appellant:

Two instruments parts of same contract must be construed together, and where one has superseded or followed the other, reference may be had to the latter to explain any ambiguity. 9 R. 30; 3 R. 171; 2 An. 92.

No construction rendering important expressions useless is admissible. 12 M. 114; 4 N. S. 85; 8 N. S. 365; 12 L. 539; 3 R. 171; 3 An. 578; 4 An. 485.

Documents in form of sale shown by a counter letter or its equivalent interrogatories of facts and articles to have been made without such intention, cannot serve as a sale. 23 An. 658, 666; 28 An. 357; 31 An. 348.

A tender, sufficient or insufficient, in presence of witnesses preserves the right to redemption, and authorizes a suit, the necessity of tender or consignment is dispensed with where a party absolutely refuses to receive anything. 14 L. 214.

Contemporaneous writings or their equivalents must be construed together. 21 An. 505; 29 An. 567.

In a sale with right of redemption a stipulation for interest converts the same into a loan, and the property sold, a pledge for the security of the debt. See Patterson vs Bonner, 14 L. 214, 235.

Alexander & Blanchard for Defendant and Appellee:

1. As between the parties to an authentic act of sale of immovable property, no evidence is admissible to show fraud, simulation, or to vary the written instrument, except a counter letter or admissions of defendant in answer to interrogatories on facts and articles. C. C. 2236, 2275, 2276; 4 L. 166; 19 L. 409; 10 R. 466; 12 An. 739.

No fraud or error is alleged in this case.

2. The answers of a party "interrogated on oath," as provided for by Article 2275 of the Civil Code, cannot be contradicted by parol. 3 L. 118; 4 R. 466; 10 An. 132; 12 An. 114; 26 An. 251.

Nor can the extra-judicial admissions and confessions of a party thus interrogated be proved by parol. C. C. 2290; 30 An. 898; 32 An. 635.

3. The party availing himself of the confessions made in the answers to interrogatories on facts and articles, cannot divide them; they must be taken entire. 31 An. 869, and numerous authorities therein cited.

4. Article 354 of the Code of Practice, which provides that the answers of a party interrogated on facts and article, may be disproved, does not apply to cases in which the title to immovables is involved, and when written evidence is alone admissible. 10 An. 132, 704; 12 An. 114.

5. The debtor, in an alternative obligation, has the option to deliver or perform either one of the two things promised, but he cannot divide it, and force the creditor to receive part of one and part of the other. C. C. 2069; 4 R. 54; Pothier on Obligations, Sec. 247.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action to annul a sale with the pact of redemption, on the ground that the contract was one of mortgage or of antichresis.

The defense is, that the agreement was a *vente à réméré;* that within the delay allowed for the redemption, defendant loaned plaintiff a certain sum of money to be refunded on a particular day, under penalty of a forfeiture of the right to redeem; that by the failure of plaintiff to pay on the day stated he lost the right of acquiring the property.

The District Judge considered the transaction as a sale with the pact of redemption, but rendered judgment annulling the same, on payment of a certain sum by plaintiff, within a stated delay.

From this judgment the plaintiff appeals. No amendment is asked by the defendant.

The evidence shows, that on the 5th of March, 1880, the plaintiff sold to defendant certain real estate and an interest in a market, for the sum of five thousand dollars, reserving the right of redeeming the same on return of the price, at the end of three years; that the defendant, the purchaser, was *put in possession* of the property thus sold; that on August 20th, 1881, defendant loaned plaintiff $1,500 with the condition that, if the same was not paid back on the 1st of January, 1882, the plaintiff would then forfeit the right of redemption reserved in the act of March 5th, 1880; that the time of redemption was extended to March 5th, 1883; that the plaintiff did not then tender the whole amount required to redeem the property.

In his inability to produce any written evidence, which was the only admissible proof in the absence of a charge of fraud or error, to show that the contract was one of mortgage or of antichresis, the plaintiff ventured to probe the conscience of his adversary, who answered the interrogatories in a manner which establishes his defense.

The reasons assigned by the District Judge show an elaborate and thorough investigation of the differences of the parties, and justify his conclusions.

It is, therefore, ordered and decreed that the judgment appealed from be affirmed with costs.

No. 113.

Succession of James Marks.

A will speaks as of the death of the testator, and conveys all the property owned by him at that time, unless a contrary intention manifestly appears. This is true even though the property may have been wholly changed in the interval between the making of the will and the death.

The word "property" used in a will has as broad meaning as "estate" or "succession," and is identical with those words.

Succession of Valentine, 12 Ann. 286, and Lawson case, Ibid. 603, overruled.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

Land & Land for Plaintiffs and Appellees:

1. A disposition, couched in terms present or past, or a disposition, the terms of which express no time, refers to the time of making the will, and embraces only property owned at the date of the will. C. C. 1720-22.

2. Where the disposition reads "all the balance of my property I will to my six brothers and two sisters, to be equally divided between them," it was held that it was a disposition only of present property, and did not include future acquisitions. Succession Valentine, 12 An. 286; Lawson's case, Ib. 606.
3. The instant case is identical with that of Valentine, and the entire absence of any reference to the estate or succession of the testator differentiates it from cases in 8 La. 489 and 2 An. 580, and from the Burnside case.
4. A bequest which does not embrace the whole or a fixed proportion of the estate or succession of the deceased is a particular legacy. C. C. 1606-12; 12 An. 606; 30 An. 271; Marcadé 4, No. 119; Toullier Vol. 3, No. 510.
5. Sales and donations constitute tacit revocations of legacies for all that has been sold or given, though the things have returned into the possession of the testator. C. C. 1695. The legacy of a note is revoked so far as it has been collected by the testator. The legacy was not perfect until the testator died and then it took place as to what was then due. 4 N. S. 428.

The legacy of money in a particular drawer is satisfied by payment of money found there, though of less amount. 5 N. S. 102.

R. J. Looney, T. F. Sorrels and *M. L. Jones* for Defendants and Appellants.

The opinion of the Court was delivered by

MANNING, J. James Marks made his olographic will in May, 1879, and died in June, 1882, at the age of seventy-seven years. He was never married. His nearest surviving relatives are the children of pre-deceased brothers and sisters. After directing the payment of his debts there follows several legacies in separate clauses, and then these two items upon which hinges the construction of the will:

Item 6. I give the balance of my property of every kind and description to (here follow the names of some of his nephews and nieces) to be equally divided between them, but such as have received advances are to be charged with that much as part of their shares.

Item 7. I release my executors from the trouble and expense of taking an inventory and appraisement of my property and here give a statement of all the property that I have. (Here follows a long list of notes, accounts, land warrants, and two large tracts of land, statement of moneys in bank, and judgments.)

Between the date of the will and his death, the testator had disposed of all his land and nearly all the money, rights, and credits enumerated, and had acquired other lands, and had invested his money in other notes and securities, so that at his death he had but little of the property he owned when he made his will. He seems to have been a busy bustling man and changed his investments with rapidity.

The contention is that the will disposes only of the property owned by the testator at the time of making it, and consequently as to the

property acquired thereafter the testator died intestate. The lower Judge so ruled. We have lately examined this and cognate questions in the Succession of Burnside, going over the whole ground, and considered the subject in the light both of principle and authority, and have held that the will in that case spoke as of the date of death. We see no reason to doubt the correctness of that ruling and shall apply it here.

The inveterate propensity of the common lawyers to invent terms and apply unbending formulas in their treatment of the multifarious concerns of life, produced a habit of mind from which that branch of the profession has only begun to extricate itself in recent years. They gave especial significance to words such as "estate," "effects," etc., and would not permit them, in the mouths of laymen, to mean anything else. They recognized that the true and indeed the only rule for the construction of wills was to ascertain the intention of the testator—for what is a man's will but his intention?—but in the same instant they required that that intention should be expressed in their way. This produced a succession of decisions in which the manifest intention of testators was violated because they had not used the language the lawyers had invented, or had used it in a sense different from theirs. Of what possible consequence can it be that the words "estate" or "succession" are not used by Marks in his will? Why should it be of any more consequence that in nominating executors he has omitted the words "without seizin," except that a senseless requirement still remains in the Code? Does not every one know, when a business man, a plain layman outside the legal profession, who knows nothing of technical terms or their occult meaning, writes his will and gives the whole or the residue of his property to designated persons, that he means what the lawyers mean when they say "estate" or "succession?" And when he selects tried and trusted friends to execute his intentions, what absurdity to make the extent or duration of their power depend upon the employment or omission of words which to him are meaningless.

The case is identical with Burnside's and the language almost the same, and it would be impossible to select two better illustrations of perversity of construction than would be furnished if we should give to the word "property" a restricted meaning. These two eminently practical business men employ the same word to designate their possessions—the word which is in common use for that purpose—when writing that document which all admit must be construed, not by technical professional rules, but by intelligent effort to ascertain what the

writer meant. And yet in both cases it is argued that the employment of that word instead of "estate" has significance.

Burnside's language is, after reciting special legacies,--the residue of my property of every description, say stock in trade, notes * * * etc., I bequeath to, etc.

Marks writes, I give the balance of my property of every kind and description to, etc.

The parallel of the two cases does not end there. Marks gives in the seventh item a complete list of his property. It is urged upon us that this was done to inform the legatees of the objects of his bequest. He states his object to be the avoidance of the trouble and expense of an official inventory.

The learned Judge below, who annually gives us proof of his thorough researches and admirably poised judgment, decided for the contestants on the authority of Valentine's Succession, 12 Ann. 286, which along with Lawson's case, Ibid. 603, we overruled in the Burnside decision. We then passed in review the whole jurisprudence of this Court upon this subject and applied and reaffirmed the doctrine of the earlier cases. Shane vs. Withers, 8 La. 489; Compton vs. Prescott, 12 Rob. 56; Succession of Fisk, 3 Ann. 705; McDonough's case, 8 Ann. 252. It is unnecessary to repeat here what we there said.

The brief of contestants informs us that there is no controversy over the first five items of the will. As to the sixth we hold that the disposition therein contained embraces the "balance of the property of every kind and description" which the testator owned at the time of his death.

It is therefore ordered and decreed that so much of the judgment of the lower court as restricts the testamentary disposition of James Marks to the property owned by him at the time of making his will and declares his intestacy as to all subsequently acquired, is avoided and reversed, and it is now adjudged and decreed that the legatees named in the sixth item of the will are entitled to the residue of the property of the testator, after the special legacies are deducted, to the exclusion of all others, and that the will be thus executed, the contestants paying the costs of both Courts.

No. 119.

THE STATE OF LOUISIANA VS. THOMAS BROWN.

The Judge does not err in refusing to give to the jury a charge, however legal, which is evidently covered by previous charges. Such charge is unnecessary.

Sentence can be legally passed on a conviction of guilt of *larceny*, although the indictment was for *burglary* and *larceny* and the verdict was on *both*, and the indictment, fatally defective on the count for *burglary*, was, with the verdict, to that extent quashed on a motion in arrest.

The indictment and verdict on the charge of *larceny*, which is an offense not necessarily connected, remained perfect and were a good foundation for the sentence.

APPEAL from the Thirteenth District Court, Parish of St. Landry. *Hudspeth*, J.

F. F. Perrodin, District Attorney, for the State, Appellee.

L. Dupré for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant was indicted and tried for burglary and larceny. The indictment having been quashed on a motion in arrest, in so far as it charged burglary, the court proceeded to pass judgment on the prisoner and sentenced him to eighteen months' imprisonment at hard labor in the State penitentiary.

He appeals from the judgment and sentence.

His counsel alleges as errors:

1. That the Judge erred in refusing to charge the jury: "If the jury can arrive at any other conclusion than that of the guilt of the accused, they must acquit."

2. That the indictment being fatally defective in one respect, as far as it charged burglary, it should have been avoided as a whole.

I.

The District Judge rightfully declined to charge as requested.

The bill shows, that the court had first charged the jury, that the prisoner must be given the benefit of every reasonable doubt; that, under the law, every man charged with the commission of a crime was presumed to be innocent, until the contrary was proved beyond a reasonable doubt, and that accordingly, after weighing and sifting the evidence submitted to them, if the jury found that there existed a reasonable doubt in their mind of the guilt of the prisoner, then and in that event their duty was to give him the benefit of such doubt and acquit him, and that they could only convict him when satisfied that the case had been made out against him beyond such reasonable doubt. Proceeding further, the court explained fully the meaning of reasonable doubt.

The charge asked was covered by those previously given and therefore unnecessary.

The prisoner does not show that he objected to the charge and explanation thus given and which appear to be fair, impartial and legal. It is impossible to conceive how the prisoner, by the refusal of the Judge to give the charge asked, could in the least have been injured.

II.

The indictment charged burglary and larceny. The prisoner was tried and convicted of both charges. It is settled that both offenses may be charged in the same count of the indictment, without making the indictment amenable to duplicity. 34 An. 50, and authorities there cited.

The indictment could have been quashed as far as it charged burglary, as well before as after trial. In the first instance, the case could have proceeded on the charge of larceny, which was not necessarily connected. In the second, sentence could be passed on the conviction of guilt of larceny.

Wharton on Crim. Ev. 138, says:

"All unnecessary words may, on trial, or arrest of judgment, be rejected as surplusage, if the instrument would be good on striking them out. Even an indictment, on its face made defective by insensible or repugnant allegations, may, by discharging phrases which destroy or pervert its meaning in this way, be made good, the noxious surplusage being discharged upon motion in arrest of judgment." See 18 N. H. 563.

The action of the District Judge is sustained by additional reasons set forth in his opinion.

After striking out the part of the charge in which the burglary was attempted to be set forth and the verdict on it, the charge and conviction of larceny remained perfect in all their parts.

Under such circumstances the court was authorized to pass sentence.

Judgment affirmed.

No. 116.

J. S. BACON VS. MARY C. SHULTZ.

A partition defective in form and voidable for lesion may be ratified by word and deed, and made conclusive and binding.

APPEAL from the Second District Court, Parish of Webster. *Drew*, J.

J. D. & J. T. Watkins for Plaintiff and Appellant.

McDonald & Reynolds for Defendant and Appellee.

The opinion of the Court was delivered by

MANNING, J. The plaintiff and defendant are the only children of J. S. Bacon the elder who died in September, 1880. The father had been in declining health, and two months before his death had partitioned his property. The division of the realty was by notarial act. The notes and accounts were divided verbally in the presence of witnesses. Mrs. Shultz has children, and to them her father gave some notes. In November, 1880, the plaintiff and defendant, two months after their father's death, put in form the division of the notes, etc., that he had made. The writing recites that they "do hereby agree to make an amicable partition of the succession falling to them upon the death of their father as herein set forth. There being no debts outstanding, all charges of every kind against said succession having already been paid by said parties to this agreement, each one-half, and all lands owned by J. S. Bacon, deceased, having been duly partitioned as evidenced by donations *inter vivos*, by notarial act duly recorded in said parish, and all stock, mules, cattle and hogs and miscellaneous movable property, having been divided and delivered, which partition is hereby ratified and adopted, leaving now to be divided certain rights and credits which, by mutual agreement, are hereby partitioned as follows."

This suit is to rescind and annul the partition, made by the father and perfected as to the notes and credits by this writing of November, 1880, because of lesion.

Of this partition the plaintiff as a witness says: The credits were divided as agreed upon before his father's death. Says the understanding between him, his sister and his father was before the deed was signed, that the notes and accounts were to be divided just as they were divided in the partition. That he does not recollect ever hearing his father say that it was a final division, but he asked them to divide it in that way, and they told him they would. That he supposes his father died under the impression that all the details of the division of his estate had been agreed on between himself and his sister. Says they had agreed sometime before the act of partition on the terms of the division of the notes and accounts; thinks they agreed in April before his father died; that his father designated the claims that were received by them in partition.

He took possession of the property allotted to him, received and col-

lected the notes and accounts assigned to him that were collectible. There were notes of one Goodwill that had been given to Mrs. Schultz' children in the same division. He presented those notes to Goodwill for payment, on behalf of Mrs. Schultz, and received Goodwill's draft for their amount in her favor. He owed Goodwill, who desired to deduct his debt from their amount, but that was refused because the notes did not belong to him. He delivered the drafts to his sister. In January, 1881, he borrowed two thousand dollars from his sister, and mortgaged a tract of land received from his father among the divided property, to secure its payment. He did not pay his note, and she sued him. He then brought this suit.

The recital of his own testimony shews a ratification of the partition. His own acts taken singly exhibit it. Taken together, the proof cumulates beyond requirement. No fraud or deceit is alleged or proved, no violence pretended. Want of form, if there be any in the partition, is cured. Lesion was condoned. But in truth the testimony renders doubtful whether there was lesion. If there was, it does not exceed the disposable portion. Rev. Civ. Code, Arts. 1724 and 1875; Chesnau vs. Sadler, 10 Mart. 726; Jouet vs. Mortimer, 29 Ann. 212.

No words are needed here to characterize the plaintiff's reprehensible conduct. His own recital of his own acts is his sharpest condemnation. The lower Judge turned him away from the temple of justice. He has no place within its portals.

Judgment affirmed.